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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JOHN C. CONDON,
Petitioner,

v.

STATE OF MAINE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MAINE SUPREME JUDICIAL COURT

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QUESTIONS PRESENTED

1. Whether, in a murder case, due process under the Fourteenth Amendment requires a trial court to instruct the jury as to the dispositional consequences of a verdict of not guilty by reason of insanity, unless the defendant objects to such an instruction, when a state has provided that confinement of the defendant is a consequence of that verdict.

2. Whether, in a murder case, due process under the Fourteenth Amendment forbids the introduction into evidence of a recorded tape of inculpatory statements of a defendant during a custodial interrogation when:

   (a) the interrogating police officers suspect the

defendant of murder but withhold that information from him;

(b) the defendant's willingness to be questioned in the absence of an attorney is in need of clarification, and if clarified, would elicit from him an unwillingness to be questioned about the murder; and

(c) the State has failed to elicit any verbal response from the defendant to a crucial question concerning his right to refuse to talk and must rely on the trial testimony of the interrogating officer that the defendant had gestured affirmatively.

TABLE OF CONTENTS

CITATIONS

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PETITION FOR A WRIT OF CERTIORARI
TO THE MAINE SUPREME JUDICIAL COURT

Petitioner, John C. Condon, respectfully prays that a writ of certiorari be issued to review the judgment of the Maine Supreme Judicial Court rendered on December 5, 1983, rehearing denied December 21, 1983.

OPINIONS BELOW

The opinion of the Maine Supreme Judicial Court affirming the judgment of the Superior Court,

Cumberland County, convicting petitioner on three counts of murder, is reported in a slip opinion dated December 5, 1983, and appears herein at Appendix A. The opinion of the Maine Supreme Judicial Court denying rehearing is unreported and appears at Appendix B.

JURISDICTION

The judgment of the Maine Supreme Judicial Court was entered on December 5, 1983. Rehearing was denied on December 21, 1983. The jurisdiction of this Court derives from 28 U.S.C. §1257 (1966).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment, United States Constitution, which provides:

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

2. The Sixth Amendment, United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

3. The Fourteenth Amendment, United States Constitution, which provides, in pertinent part:

> Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

A. Course of proceedings in the case now before this Court.

On July 23, 1982, in a cause then pending in the Superior Court, Cumberland County, for the State of Maine, entitled State of Maine v. John C. Condon, Criminal Action, Docket No. CR-81-1433, petitioner was found guilty by a jury on an indictment of six counts charging violations of Me. Rev. Stat. Ann. tit. XVII-A §201(1)(A) and (B) (1964 & Supp. 1983) (three counts of murder); Me. Rev. Stat. Ann. tit. XVII-A §802 (1964 Supp. & 1983) (one count of arson); and Me. Rev. Stat. Ann. tit. XVII-A §§353, 362 (1964) (two counts of theft by unauthorized taking). Tr. X at p. 121.

On July 23, 1982, the Superior Court entered judgment and sentenced

petitioner to life imprisonment on each of the three counts of murder and lesser concurrent sentences on the three remaining counts. Id., at pp. 123-24. This judgment and sentence was affirmed by the Maine Supreme Judicial Court on December 5, 1983, State of Maine v. John C. Condon, Decision No. 3368, Law Docket No. Cum-82-325. The Maine Supreme Judicial Court denied rehearing on December 21, 1983.

B. Relevant facts concerning the underlying convictions for murder, arson, and theft

1. The Police Interrogation

At approximately 2:00 a.m. on September 28, 1981, petitioner was stopped by the South Portland police on suspicion of drunken driving (Tr. V, pp. 18-22). After having been given, and having passed, a test for sobriety, he was arrested for driving without a

license and taken into custody on suspicion of unauthorized use of the automobile he was driving, and later, theft of a bag of jewelry found inside the car. Id., at 23-27; VI at 8-9.

In fact, petitioner had committed a triple homicide of his sister, brother-in-law, and their twelve-year-old son and was departing from the scene of the crime in a company car leased to his brother-in-law.

Requested by the South Portland police to investigate the home occupied by petitioner's sister's family, the Yarmouth police discovered

the mutilated bodies[1] of petitioner's sister and brother-in-law and immediately notified the Yarmouth police station by phone that a "homicide" had been committed. Tr. IV at 70. The time was approximately 3:05 a.m. Id., at 55.

Petitioner's interrogation by the South Portland police began at approximately 4:04 a.m. App. C, p. 1. The interrogating officers, Detective Sargent Sanborn and Lieutenant Toderico, both knew at the outset that "there had been a death" at the home of

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[1] Officer Beliveau described the body of petitioner's sister as showing "slash and stab wounds" and having suffered "an extreme amount of physical damage." Tr. IV at 62. Photographs of the two bodies were offered at trial (and admitted into evidence) for the purpose of demonstrating that the deaths were "particularly outrageous, revolting, brutal or shocking" (id., at 66).

petitioner's sister. Toderico admitted at trial that he suspected the petitioner of murder because, among other things, he had recovered a K-Bar knife with fresh blood stains on it that had fallen out of petitioner's pants when they were taken from him "to preserve any possible evidence" of the crime of murder before the interrogation began, and because he had noticed fresh cuts on petitioner's hand and thigh. Tr. VI at pp. 7, 11, 16-17., App. C, p. 24.

Although Sanborn knew that he would not have been summoned at his home by Toderico at 3:00 a.m. unless the petitioner was suspected of committing "some type of felony" (id. at 8-9), and although he had been shown the K-Bar knife with fresh blood on it (App. C, p.24) and had also observed fresh cuts on petitioner's hands and leg (ibid.), he insisted at the trial

that all he had seen on the knife was "a dark-colored substance", that he had formed no opinion "as to what it was at that time" (Tr. V at p. 151), and that he had not suspected the petitioner of homicide (id. at pp. 165-6).

An accurate transcript of the interrogation tape was made and marked as non-jury exhibit 61. Tr. V at pp. 135-36.

After introducing himself and Lieutenant Toderico, Sanborn began the interrogation as follows (App. C, pp. 1-2):

Sanborn: Okay. Now, what I want to do is give you your Miranda warning so that you understand. I understand that you have already been informed of what your rights are. I want to re-state your rights. Okay?
Condon: Yeah. (mumbled)
Sanborn: I am a Police Officer. I warn you that anything you say can be used in a court of law against

you. That you have an absolute right to remain silent. That you have the right to the advice of a lawyer before, and the presence of a lawyer here with you during questioning, and if you cannot afford a lawyer, one would be furnished for you free before any questioning if you desire. Do you understand each of your rights?

Condon: Um, hum.

Sanborn: Are you willing to talk with us without having an attorney present?

Condon: To a certain extent, yeah. [Emphasis added]

Sanborn: Okay. Okay, you can refuse to answer any question that you choose to and refuse to answer it. Okay?

Condon: (no verbal acknowledgement)

Without any further attempt either to ascertain what petitioner meant by his willingness to talk in the absence of an attorney "to a certain extent", or to have petitioner verbally confirm an understanding of his right to refuse to answer any question, and

without informing petitioner that he was suspected of murder, Sanborn and Toderico continued their interrogation.

The first half of the interrogation was fairly general in nature but included a number of questions clearly unrelated to the unauthorized possession of an automobile or theft of jewelry, such as, "Did you get into an argument with them [petitioner's sister and brother-in-law] over it [petitioner's previous arrests], Son?" (id., at 7); "Is your sister the type who's very argumentative with you?" (id., at 10); "Did she act disgusted with you about the previous arrests? (ibid); "Does it irritate you that she's as well off as she is?" (id., at 13); "Do you argue with your sister?" (ibid); and "How about [arguing] with your brother-in-law?" (ibid).

At about 4:25 a.m. Toderico, who had stepped outside the interrogation room to retrieve petitioner's pants, was informed of the triple homicide. Upon returning to the interrogation room, Toderico signalled to Sanborn out of petitioner's line of sight that a triple homicide had occurred by holding up three fingers and mouthing the word "homicide". Tr. VI at 12. The point in the interrogation at which this occurred is indicated by the following colloquy (App. C., p. 15):

> Sanborn: Okay. So, the only call you made was to, ah, that shirt's got to go, right?[2]

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[2] Toderico testified that when he "went down and back to the interview office", he "took the rest of [petitioner's] clothing away from him, his socks and shirt which was remaining, and did give him a pair of trousers to put on and [petitioner] put the blanket back around himself." Tr. VI, p. 12.

Toderico: Yeah. I need that shirt.
Condon: Okay.
Sanborn: The, ah
Condon: Oops, I don't get no shirt, man?
Toderico: No, that's the best we can do right now, but you still have the blanket, though.
Condon: You did a good job on it, okay?
Toderico: Yeah, not too bad.

The questioning that followed clearly reflects an attempt to elicit from petitioner a confession of the homicides and a motive for the crimes (id., at pp. 16-17):

Sanborn: Okay. Now the only, one and only time you've been over to your sister's house in the last ...
Condon: Month and a half, I'd say.
Sanborn: ... month and a half was last night.
Condon: Yeah. Can I have one of those?
Sanborn: Certainly.
Condon: Thank you.
Sanborn; Was last night at about 10:30.
Condon: Yes. Last night about ...

Sanborn: What time would you have left? You got there ...

Condon: I left there at eleven, or 11:14, 11:15, I think, I wear a watch with the light on it.

Sanborn: So, you got there at 10:30, you left at 11:15. You're sure of that time because you looked at your watch?

Condon: Yep, Yep.

Sanborn: Are you sure of time that you stayed?

Condon: Yeah.

Sanborn: And that you got there?

Condon: Yeah.

Continuing (id., at p. 20):

Sanborn: But when you get her irritated and she has the ability of ...

Condon: She's very, ah, strong, ah, spoken.

Sanborn: Okay.

Condon: We will do this or that is, you know. That's her final statement, only thing is, she'll stall him off and she's got the fucking money to do it her own way anyway, so, you know.

Sanborn: Do you have a fiery temper? Do you did you do?

Condon: Yeah, later I have, pissed off at the guy that was riding my Harley, pissed out at the guy who stole my wallet, and I had 250

bucks in it, and I couldn't bail myself out with 50 bucks, because I didn't have it, and, ah, I got picked up in Scarborough, you know. So I thought I'd get my girlfriend and take off for a while. Go down to Boston, talk w/ this banker, and sit down there and start paying these fines as they come. I've got a lot of fines coming up.

Sanborn: That really infuriated you, didn't it. Nobody was that willing to help you out.

Further (id., at pp. 21-22):

Toderico: I'd say he's been, you've been very cooperative with us tonight.

Condon: Yeah.

Toderico: You couldn't ask for better cooperation.

Condon: Well, thank you.

Toderico: Almost like you're glad everything, you know.

Condon: I'm happy I'm out of here, but, ah, this is all a bust that's going on here. Detective Sergeant...

Sanborn: The knives that they...excuse me?

Condon: I said Detective Sergeant here.

Sanborn: I found you very cooperative so far.

Condon: I know.

Sanborn: Okay. Ah, the knife that Lieutenant Toderico found in your possession tonight, ah, the one that fell out of your pant leg when you first got here to the station. Okay?

Condon: Yeah.

Sanborn: Ah, what do you use that knife for?

Condon: I just got it tonight.

Sanborn: Where'd you get that?

And further (id., at pp. 23-24):

Toderico: They didn't ask you about the cut on your hand?

Condon: Oh, they knew that because I told them about the motorcycle.

Toderico: No. But I mean the fresh cut. The cut that you said you got from your hitting the guy, you said.

Condon: I could have gotten it from that. I don't know. Look at my hand. I got so many fucking cuts, I don't know; some are old, some are new.

Toderico: How did you get the fresh cut on your right leg?

Condon: I don't know where I got that.

Toderico: Because that looks like that's fairly fresh; it wasn't from the accident.

Sanborn: There's some fresh blood on that knife, isn't there?
Condon: I don't know.
Sanborn: How would you have gotten fresh blood on the blade of that knife?
Condon: I don't know. I don't remember getting blood on that knife at all.
Sanborn: Okay. You didn't use that knife, that knife during that fight at the hotel?
Condon: No.
Sanborn: Okay. Did you show your sister or your brother-in-law the knife?
Condon: No.
Sanborn: Okay. To the best of your knowledge, Son, is, what is the health and well-being of the people, your sister and your brother-in-law over there on, what is it, Seabrook Road, did you say?
Condon: Seaborne Drive.

Still further (id., at 25):

Toderico: How old's the boy?
Condon: He's eleven, I think. Eleven or twelve. He's eleven.
Toderico: And, you know, you didn't see him at all while you were there?
Condon: No. No.
Toderico: Is he that sound a sleeper that he wouldn't have heard you people

discussing the car or anything?

Condon: I guess. He sleeps upstairs; we were downstairs.

And finally (id., at 27):

Sanborn: You've ever taken anyone's life, Son?

Condon: No. Never. No. Why did someone knock off my sister, or something?

Sanborn: Well, I don't know. Why don't you tell me.

Condon: Well, it sounds like somebody did.

Sanborn: Why would you, why did you say that?

Condon: Because I heard homicide on the fucking radio. I'm no dummy. What am I doing down here with the Detective Sergeant for a fucking, if a stolen car, or something? Big deal. Something's going on here. Can I have another cigarette?

At the trial, the prosecution took the position that it was improper to play the tape beyond the point at which Condon asked for a cigarette (rather than before the question, "You've ever taken anyone's life,

Son?") because Condon's very next statement, "I'm not going to open my mouth too much about that" (emphasis added), was an exercise of his Miranda right to refuse to answer questions. Tr. V at p. 153. Nevertheless, the interrogation continued until it became clear that petitioner was not prepared, as Sanborn was to suggest, to "clean [his] conscience and, oh, to admit it, or do it the easy way, and get it behind [him]." Thus (App. C., pp. 27-30):

Sanborn	Yeah.
Condon:	I'm not going to open my mouth too much about that. Jesus Christ. You know, that's serious shit . . . (mumbled) . . . hurting someone.
Sanborn:	Well, if someone did knock off your sister, and you're the one who brought up someone knocking off your sister, you may have more information about it than I at this time, Son.
Condon:	No, I don't.

Sanborn: Okay?
Condon: No.
Sanborn: Like you said, you're not going to say too much about someone knocking off your sister because it's serious business, right?
Condon: I'm not answering that question.
Sanborn: Okay.
Condon: I heard homicide on the radio.
Sanborn: Where did, where were you when you heard homicide on the radio?
Condon: Up, up by the picture taker, man. When I was first . . . taken.
Sanborn: You got pretty good ears, Son.
Condon: Sure do. Picked up everything, right? I've been arrested a few times.
Sanborn: Okay.
Condon: I'm no dummy.
Sanborn: Okay. Does that . . .
Toderico: Yeah, but the thing is nobody said homicide.
Sanborn: Okay.
Condon: Look, that's what I heard, so I'm not talking any more about that. That's serious shit.
Sanborn: Yeah, it is serious.
Condon: Yeah. So I'm not talking about it. I don't know nothing about no homicide. Period.
Sanborn: You don't seem too upset about it, if it is true.

Condon: Well, I don't know if it is or it isn't. Who's pulling my leg, or what.

Toderico: Jes, I . .

Sanborn: Okay, if we, if we want to discuss this homicide, you don't want to talk about it.

Condon: No, I don't want to talk about any homicide, no. I'll get a lawyer before I do that.

Sanborn: Okay. All right. We're not going to push you at all.

Condon: That's a Miranda right there.

Sanborn: That's right. That's why I read you your Miranda.

Condon: I've been pretty cooperative, but I ain't saying nothing, nothing about nothing I don't know nothing about.

Sanborn: Okay.

Condon:

Sanborn: Okay. I'll tell you what we're going to do at this point, Son, okay?

Condon: Yeah.

Sanborn: Ah, we're going to get some more informaton.

Condon: Sure.

Sanborn: Okay. We're not going to hound you. That is not our intent in talking to you.

Condon: Sure.

Sanborn: I thought that you would want to talk with us, and give us more information, ah, you know.

Sometimes people prefer to, to clean their conscience, and, ah, to admit it, and do it the easy way, and, and get it behind them. You have exercised your right to, to, ah, stop questioning. That you mentioned that if you were to answer any questions about a possible death of your sister, then you want an attorney, so we're going to end it right there.

Condon: Okay.

Sanborn: Okay? And we're going to take you back upstairs, and put you in the cellblock, and, ah, we're going to contact the proper authorities, and, if you change your mind, and wanna talk to us, or talk to me, then, ah, all you have to do is speak. We'll contact a lawyer for you eventually here.

Condon: (burp) Excuse me.

Sanborn: Until that time, ah, we will not ask you any further questions.

Condon: Okay, fine.

Sanborn: Okay?

Condon: Yeah.

Sanborn: Let's take him back up.

Petitioner's constitutional objections to allowing the tape to be

played before the jury were duly raised at Volume V, pages 118-125. On voir dire, eleven months after petitioner's interrogation, Officer Sanborn conceded that petitioner had made "no verbal acknowledgement" to the question, "You can refuse to answer any questions you choose to and refuse to answer it. Okay?", but testified that petitioner had conveyed an affirmative response by "the movement of his head back and forth".[3] Id., at pp. 130-31, 140.

After the tape had been played outside the hearing of the jury, the trial court ruled that petitioner had voluntarily waived his Miranda rights until the point at which he

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[3] Over petitioner's objection, the State was permitted to lead Sanborn into testifying that the movement of petitioner's head was an affirmative "nod." Id., at pp. 131-32.

stated, "I'm not going to open my mouth too much about that." Id., at pp. 152-53, 157.

An hour and three quarters after the jury had begun its deliberations, it submitted a request to the judge to listen to the tape recording of petitioner's interrogation. Tr. X at p. 115. An hour and fifty-three minutes after the jury had heard a replay of the tape, and returned to its deliberations, it agreed upon a verdict of guilty. Id., at pp. 117-118.

2. Evidence That Petitioner Was Insane and Extremely Dangerous to Others.

In support of his plea of not guilty by reason of insanity, petitioner presented the testimony of three psychiatrists, a psychologist, a nurse and a social worker. The testimony given by the defense witnesses esta-

blished that petitioner had been committed in the ten-year period preceding the homicides to various mental institutions on at least seventeen occasions where his condition had been diagnosed as severe manic-depressive illness associated with delusions and psychotic hyperactivity. Tr. VII, VIII and IX. Dr. Jacobsohn, who testified both for the defense and for the prosectuion, and who alone presented medical testimony for the prosecution, had personally diagnosed petitioner as a manic depressive suffering from delusions on two earlier occasions and on each occasion had had him hospitalized. Tr. VIII at pp. 103-107, 125-130, 139. Although Jacobsohn opined, on the basis of a court-ordered examination conducted two days after the killings and the police interrogation, that petitioner was neither manic nor depressive

at the time of the killings, he also opined that the number of stab wounds petitioner had inflicted on his victims -- at least 25 to 30 -- implied a "high level of violence" and energy consistent with a manic-depressive type (TR VIII at pp. 164-65), and that the killings would not have occurred but for petitioner's illness and that petitioner was in "an early phase of mania ... the beginning of a manic phase" on the night of the killings. Tr. IX at pp. 176-77, 182, 187-88, 198-203.

There was no disagreement among any of the witnesses that petitioner was an extremely dangerous person when in a state of mania and that, both before and after the killings, he had either threatened to kill others or thought about doing so. For example, Dr. Campbell, a psychiatrist,

testified that petitioner on one occasion "went beserk, took his father's watch and stuck it up his rectum" and, on another, had threatened to kill the Dean of Roanoke College. Tr. IX at pp. 22-23. Dr. Campbell also testified that petitioner believed he was a prophet who "has got work to do" and whose work was "often thought of [by petitioner] in terms of blood and a -- revenge" (id., at 38), and that he considered petitioner "extremely dangerous" and "homicidal," "menacing, overly hostile, quite capable of violent and destructive behavior." Id., at pp. 69-70.

Another psychiatrist, Dr. Billinsky, informed the jury of his opinion that petitioner's behavior, when petitioner was admitted to the Augusta Mental Health Institute in January 1982, several months after the

killings, was "explosive" and that he was "expressing thoughts of killing someone." Tr. VII at pp. 35-37; 80.

And Dr. Bishop, a psychologist, testified that petitioner suffered from the delusion that he was "mandated" by the Bible to "come forth either with a sword, which he can interpret literally to be a sword or a knife ... and cut people down..." (Tr. VIII at pp. 60-61) and that he, too, considered petitioner to be "extremely dangerous." Id., at pp. 79-80.

Finally, evidence of the homicides included testimony by a pathologist that petitioner had inflicted on his sister eleven stab wounds, five deep cuts and three superficial cuts; that petitioner had inflicted on his brother-in-law between fifteen and seventeen stab wounds (three of which were death-producing),

five deep cuts and four superficial cuts; and that petitioner had inflicted on his nephew two very deep cuts in the neck, both of which completely transected his wind pipe. Tr. IV at pp. 101-103, 109, 112.

Over petitioners objections, lurid photographs of the victims in the positions they were found were also introduced into evidence. Tr. IV at pp. 63-66, 80.

3. Petitioner's Request for a Jury Instruction on the Consequences of a Verdict of Not Guilty by Reason of Insanity

The following jury instruction requested by petitioner at Volume IX, p. 256 was denied (R.61; Tr. IX at pp. 256-265):

> If you find the Defendant not guilty of the charges against him by reason of mental disease or defect, the Court shall order the Defendant committed to the custody of the Commissioner

> of Mental Health and Corrections to be placed in an appropriate institution for the mentally ill. The Defendant will be held in the appropriate institution for an indeterminate period of time. He may be released only after a hearing before the Superior Court. At that hearing it will be the burden of the Defendant, if he is to be released or discharged, to prove beyond a reasonable doubt that he may be released or discharged without likelihood that he will cause injury to himself or to others due to mental disease or defect.

In requesting the above instruction, which summarizes the dispositional consequences of a verdict of insanity under the statutory law of Maine, petitioner did not explicitly refer to the requirements of the United States Constitution. Instead, he relied upon federal and state court decisions and on statistical evidence that jurors are loath to return a verdict of not guilty by reason of

insanity in the absence of some assurance that the defendant "does not walk out of the courtroom" (id., at pp. 257-60, 264).

Petitioner submits that, implicit in the rationale for his requested instruction, are the due process concept of fundamental fairness and the need to secure petitioner's constitutional right to a jury trial in which the jurors are properly instructed.

4. The Opinion of the Maine Supreme Judicial Court

In affirming the judgment of the trial court, the Maine Supreme Judicial Court found "no error" in its conclusion that "the defendant effectively waived his fifth amendment rights." App. A, p. 4. The opinion correctly states that there was no evidence of force or intimidation and

that the petitioner acknowledged that he understood the Miranda "warnings" (assuming that a response of "um, hum" is an acknowledgment). Id. at 5.

The opinion incorrectly states, however, that the record provides rational support for the trial court's determination that the defendant "knowingly, intelligently, and voluntarily waived his rights after receiving his Miranda warnings" (ibid.) and that petitioner exercised his right to remain silent " when the homicides became the focus of the investigation" (id., at 6; emphasis added). In fact, the trial court made no such determination* and the focus

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* After hearing the tape and argument of counsel, the trial court stated only that it was "satisfied ... that the defendant voluntarily waived his rights". Tr. V at p. 152.

of the interrogation clearly became "the homicides" no later than halfway through the interrogation when Toderico signaled to Sanborn that there had been a triple killing (if, indeed, "homicide" was not a focus of the interrogation from the very outset), long before petitioner concededly exercised his Miranda rights by saying, "I'm not going to open my mouth too much about that." The opinion also holds that the failure of the police to inform the petitioner of "the exact nature" of the crime about which he was being interrogated was not dispositive of the issue of waiver and was "but a factor to consider" in making that determination. Id., at 5.

Finally, the opinion upholds the trial court's refusal to instruct the jury on the dispositional consequences of a verdict of not guilty by

reason of insanity on the ground that "whatever may transpire after the verdict is not the concern of the jury." Id., at 9.

REASONS FOR GRANTING THE PETITION

I.

The Due Process Clause Mandates A Jury Instruction on the Dispositional Consequences of a Verdict of Not Guilty by Reason of Insanity and Such a Ruling Is Needed to Protect Defendants in Those Jurisdictions Where the Instruction Is Forbidden.

In 1957 the United States Court of Appeals for the District of Columbia Circuit ruled that in cases where the defense of insanity is fairly raised, the trial judge must instruct the jury as to "the legal meaning of a verdict of not guilty by reason of insanity." Lyles v. United States, 254 F.2d 725, 729 (D.C.Cir. 1957), cert. denied, 356 U.S. 961 (1958),

cert. denied, 362 U.S. 943 (1960), cert. denied, 368 U.S. 992 (1962).[5]

Lyles had been tried for robbery and for unauthorized use of a motor vehicle. He had offered evidence that he was insane at the time of the crimes. The judge had told the jury

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[5] The specific instruction which evolved from the Lyles decision has undergone modification to accord with the changing construction of the commitment statute, Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968), and with changes in the statute itself, United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972). Shepard's Federal erroneously reports that Lyles was overruled by Brawner. In fact, Brawner merely modified the specific instruction which had evolved from Lyles, in order to reflect an addition which had been made to the commitment statute. See, United States v. Brawner, supra, 471 F.2d at 996-98. Lyles' essential premise, for which it is cited here, that jurors who must evaluate a plea of not guilty by reason of insanity must be told that defendant will be committed upon their returning such a verdict, remains unaffected.

that if it found Lyles not guilty by reason of insanity, he would be confined to St. Elizabeth's Hospital until he was cured "and it is deemed safe to release him," and that, once released, he would "suffer no further consequences from this offense." Reviewing this instruction, which essentially summarized the statutory procedures governing the disposition of criminal defendants found not guilty by reason of insanity then in effect in the District of Columbia, the Court, in an opinion co-authored by Judges Prettyman and Burger (now Chief Justice of this Court), reasoned (254 F.2d at 728):

> This point arises under the doctrine, well established and sound, that the jury has no concern with the consequences of a verdict, either in the sentence, if any, or the nature or extent of it, or in probation. But we think that doctrine does not apply in the problem

> before us. The issue of insanity having been fairly raised, the jury may return one of three verdicts, guilty, not guilty, or not guilty by reason of insanity. Jurors, in common with people in general, are aware of the meanings of verdicts of guilty and not guilty. It is common knowledge that a verdict of not guilty means that the prisoner goes free and that a verdict of guilty means that he is subject to such punishment as the court may impose. But a verdict of not guilty by reason of insanity has no such commonly understood meaning....

Continuing (ibid.):

> As a matter of fact its meaning [the meaning of a verdict of not guilty by reason of insanity] was not made clear in this jurisdiction until Congress enacted the statute of August 9, 1955. It means neither freedom nor punishment. It means the accused will be confined in a hospital for the mentally ill until the superintendent of such hospital certifies, and the court is satisfied, that such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others.

And finally (ibid.):

> We think the jury has a right to know the meaning of this possible verdict as accurately as it knows by common knowledge the meaning of the other two possible verdicts.

In the case at bar, which was tried only thirteen miles from the scene of the murders, the jury found petitioner guilty of committing a triple homicide, of killing his sister, his brother-in-law, and his nephew, in a spectacularly brutal and violent manner. The jury had been shown lurid photographs of the victims and had heard the testimony of numerous psychiatrists that the petitioner was insane,[6] had a long history of mental illness, and was extremely dangerous.

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[6] Petitioner contended on appeal that the evidence that he was insane at the time of the killings was overwhelming and that his conviction should have been reversed on that ground alone.

Accordingly, Petitioner requested a jury instruction that accurately stated the statutory procedure for the disposition of criminal defendants found not guilty by reason of insanity in effect in Maine at the time, and that thus informed the jury that such a verdict would not set him free to endanger the lives of still

others.[7] The court refused to give it, basing its refusal on the doctrine adverted to in Lyles, that the jury is not properly concerned with the consequences of a verdict and should thus concern itself exclusively with determining, first, whether or not the

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[7] Title 15, Me.Rev.Stat.Ann. §103 states, in pertinent part:

> §103. Commitment of persons acquitted on basis of mental disease or defect
>
> When a respondent is acquitted, by reason of mental disease or mental defect excluding responsibility, the verdict and judgment shall so state. In such case the court shall order such person committed to the custody of the Commissioner of Mental Health and Corrections to be placed in an appropriate institution for the mentally ill or the mentally retarded for care and treatment.

In State v. Shackford, 262 A. 2d 359 (Maine 1970), the Supreme Judicial Court held that a defendant committed under the above statute could not be released without proof of his sanity beyond a reasonable doubt.

defendant committed the acts with which he was charged, and, second, if he did, whether or not he was insane at the time.

The rationale of Lyles, however, which was overlooked by the Maine court, is that experience has taught us that juries are concerned with the consequences of their verdicts, and that the deck will be stacked against a dangerous defendant who pleads not guilty by reason of insanity because juries in the absence of some assurance to the contrary will assume, or at the very least fear, that the defendant will be set at large and become a menace to society.

This rationale has been confirmed by all known studies that have been made on the subject and by the many courts that have followed Lyles. See, e.g., H. Weihofen,

Procedure for Determining Defendant's Mental Condition under the American Law Institute's Model Penal Code, 29 Temple L.Q. 235, 247 (1956) ("Not a single jury studied in the [University of Chicago Law School] jury project refrained from considering what would happen to the defendant as a precondition for arriving at a decision concerning his guilt or innocence, sanity or insanity. In almost every instance the basic issue around which the discussion centered was what would happen to him if they decided in a particular manner. During the deliberations, many jurors who were somewhat disposed toward a verdict of insanity were brought over to a guilty verdict by the argument that if declared insane the defendant would go "scot free.") For the numerous states which have since

adopted the reasoning of Lyles, see Appendix D.

What gives the Lyles decision constitutional dimension is the corollary that, given the concern that juries do have regarding the consequences of a verdict of not guilty by reason of insanity, a dangerous defendant who makes such a plea will be deprived of his constitutional right to a fair trial by an impartial and unbiased jury unless the jurors' minds are relieved of the tension that will otherwise distort their consideration of the evidence.

While there is no Supreme Court decision directly in point, this Court's decisions on constitutionally mandated jury instructions demonstrate the crucial role such instructions can play in securing a criminal defendant's right to a fair trial. In Taylor v.

Kentucky, 436 U.S. 478 (1978), this Court reversed the conviction of a defendant who had requested and been refused an instruction on the presumption of innocence. This Court viewed the instruction as necessary to overcome the inevitable suspicions which arise in the minds of jurors from the arrest, the indictment, and the arraignment of the accused. The instruction, reasoned the Court, serves to convey "for the jury a special and additional caution . . . to consider, in the material for their belief, nothing but the evidence . . ." Id. at 485, quoting 9. J. Wigmore, Evidence §2511 (3d ed. 1940) at 407 (italics in original).

Similarly, in Carter v. Kentucky, 450 U.S. 288 (1981), on remand, Carter v. Commonwealth, 620 S.W.2d 320 (Kentucky 1981), this Court

ruled that a trial judge must instruct the jury that it may not draw unfavorable inferences from a defendant's failure to testify, when the defendant requests such an instruction. This Court clearly viewed it as inevitable that jurors would speculate on the meaning of that silence, citing Wigmore's conclusion that the failure to testify would most naturally appear to the layman as "a clear confession of crime" (id., at p. 301, n. 18), and noting that the importance of the instruction "is underscored" by a recent national public opinion poll which revealed that "37% of those interviewed believed that it is the responsibility of the accused to prove his innocence." Id. at p. 303, n. 21.

In reasoning equally applicable to the case at bar, this Court stated (id. at 303):

> A trial judge has a powerful tool at his disposal to protect the constitutional privilege--the jury instruction--and he has an affirmative constitutional obligation to use that tool when a defendant seeks its employment. No judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation, but a judge can, and must, if requested to do so, use the unique power of the jury instruction to reduce that speculation to a minimum.

Similarly, because no judge can prevent jurors from speculating about what will happen to an avowedly dangerous murderer if they find him not guilty by reason of insanity, it is incumbent upon the court to instruct the jury that its verdict will result in confinement, and thus bring to an end the inevitable but distorting speculations and minimize the chance that the jury will convict simply in

order to assure the safety of others, including themselves.

In Beck v. Alabama, 447 U.S. 625 (1980), on remand, Beck v. State, 396 So.2d 645 (Ala. 1980), on remand, Beck v. State, 396 So.2d 666 (Ala. App. 1981) this Court held that the jury in a capital case must be permitted to consider a verdict of guilt of a lesser included (noncapital) offense where the evidence would support such a verdict because, as the Court noted in California v. Ramos, 103 S.Ct. 3446, 3456 (1983):

> Restricting the jury in Beck to the two sentencing alternatives--conviction of a capital offense or acquittal --in essence placed artifical alternatives before the jury. The unavailability of the "third option" thereby created the risk of an unwarranted conviction.

In Ramos, the issue before the court was the propriety of an

instruction informing the jury of the power of the Governor of the State to commute a sentence of life imprisonment without the possibility of parole to a sentence that included the possibility of parole, if the jury is not also instructed of the Governor's power to commute a sentence of death. Although the majority of the Court was not convinced that the instruction impermissibly skewed the jury toward imposing death, and believed that advising the jurors that a death verdict is also commutable might "incline them to approach their sentencing decision with less appreciation for the gravity of their choice and for the moral responsibility reposed in them as sentencers" (id., at 3458), the minority viewed the instruction as misleading because it "erroneously suggests to the jury that a death

sentence will assure the defendant's permanent removal from society whereas the alternative sentence will not." Id., at 3460. Continuing (id., at 3461):

> Presented with this choice, a jury may impose the death sentence to prevent the governor from exercising his power to commute a life sentence without possibility of parole. See Gardner v. Florida, 430 U.S. 349, 359, 97 S.Ct. 1197, 1205, 51 L.Ed.2d 393 (1977) (opinion of STEVENS, J.) ("we must assume that in some cases [the instruction] will be decisive"). Yet such a sentencing decision would be based on a grotesque mistake, for the Governor also has the power to commute a death sentence. The possibility of this mistake is deliberately injected into the sentencing process by the Briggs Instruction. In my view, the Constitution simply does not permit a State to "stac[k] the deck" against a capital defendant in this manner. Witherspoon v. Illinois, 391 U.S. 510, 523, 88 S.Ct. 1770, 1777, 20 L.Ed.2d 776 (1968). See Adams v. Texas, 448 U.S. 38, 43-44, 100 S.Ct. 2521,

2525-2526, 65 L.Ed.2d 581 (1980).

Failure to instruct the jury on the dispositional consequences of a verdict of not guilty by reason of insanity unquestionably "stacks the deck" against a dangerous defendant whose sole defense is one of insanity in any state having an automatic commitment procedure, because of the jury's fear that the defendant will go "scot free." The verdict of guilty in the case at bar is, in all probability, based on just such a "grotesque mistake" because the State of Maine does require the defendant to be automatically committed in case of a verdict of not guilty by reason of insanity and prohibits his release until his sanity is established beyond a reasonable doubt.

Obviously, whether the jury would have found petitioner not guilty by reason of insanity, had it been told that such a verdict would confine petitioner in a mental institution for an indeterminate length of time, is impossible to know with any certainty. But no one can seriously doubt that a jury which had been told that a man with petitioner's proclivity toward violence would be confined to a mental institution if found not guilty by reason of insanity would have been better able to confine its attention to the proper sphere of inquiry: whether petitioner was guilty, or whether he was not guilty by reason of insanity.

II.

It Remains of Paramount Importance to Ensure that Defendants, Especially in Murder Cases, Are Properly Protected against Compelled Self-Incrimination; and This Case Presents the Court with an Opportunity to Clarify the Duties of Enforcement Officers When a Prisoner Is Suspected of Homicide and Qualifies His Willingness to Speak.

The State of Maine has conceded through its prosecutor that the petitioner's statement, "I'm not going to open my mouth too much about that"--"that" referring to the question whether he had ever taken anyone's life--was an exercise of his Miranda right not to be interrogated about his involvement in any homicide.

Logically, the State's concession ought, in and of itself, to have rendered inadmissible the colloquy that started with Sanborn's question, "You've ever taken anyone's life, son?" and included petitioner's patently incriminating question, "Why, did

someone knock off my sister, or something?"

Furthermore, the similarity of petitioner's unwillingness to talk "too much" and his willingness, expressed at the outset of the interrogation, to talk, but only "to a certain extent" strongly suggests that if the police officers had attempted to clarify petitioner's initial qualification, it would have elicited from him the same response conceded by the State to have been a refusal to be interrogated about any homicide. Indeed, it is hard to imagine that petitioner would have voluntarily blurted out such a self-incriminating statement if he had known that the murder of his sister was the subject of the police interrogation.

The State's failure to clarify what petitioner had in mind by

his qualified response, "to a certain extent," was greatly compounded in the case at bar, of course, (1) by its failure to get any verbal acknowledgement to the question whether petitioner understood his right to remain silent, knowing full well that petitioner's reaction (assuming it to have been an affirmative nod) would not register on the tape, and that the purpose of the tape was to present a full and accurate record of the interrogation; (2) by the State's having to rely for proof of petitioner's waiver on the tenuous and self-serving trial testimony of the interrogating officer whose credibility was further impaired by his having stonewalled the obvious linkage between the petitioner, a "death" in petitioner's sister's home, and fresh blood on a K-Bar knife that had fallen from petitioner's pants; (3) by the ambi-

guity inherent in petitioner's mumbled and "um, hum" responses to the other Miranda warnings; (4) by the State's knowledge that its interrogation of petitioner did in fact involve from the very beginning a "death" (Sanborn) or "homicide" (Toderico) and, half way through, a triple slaying; (5) by the use of psychologically coercive techniques of interrogation such as addressing the petitioner as "son"[8] so as to cast the State in the role of a father-confessor, stripping the

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[8] At the very beginning of the interrogation, Sanborn stated, "Okay, Son. Your real name is not Son, but it's John," to which petitioner responded "Yeah". Appendix C at p. 1

Toward the very end of the interrogation, petitioner stated that he was called "Jay" by his family. When Sanborn said he had seen "the tattoo on your arm saying Son", petitioner explained that "Son" was a nickname he had assumed. Id., at p. 30.

petitioner of his clothing and flattering the petitioner about his having been "cooperative" just before the series of questions leading to the inquiry whether he had ever taken anyone's life; and (6) by the seriousness of the suspected crime.

The seriousness of an interrogation about murder has prompted at least two courts to rule as a matter of law that if a murder suspect is not advised of this reason for his detention and questioning, his waiver of Miranda rights is not made knowingly or intelligently. Schenk v. Ellsworth, 293 F.Supp. 26 (D.Mont. 1968); Commonwealth v. Dixon, 475 Pa. 17, 379 A.2d 553 (1977). Contra: Collins v. Brierly, 492 F.2d 735 (3 Cir. 1974), cert. denied, 419 U.S. 877 (1974); People v. MacDonald, 61 A.D.2d 1081, 403 N.Y.S.2d 337 (App.Div. 1978).

As the Court observed in Dixon, quoting from an earlier decision (id., at 556):

> In Commonwealth v. Richman, 458 Pa. 167, 320 A.2d 351 (1974), this Court held that a valid waiver of Miranda rights requires that the suspect have an awareness of the general nature of the transaction giving rise to the investigation. The rationale of this holding was that it is only when such knowledge is possessed by a suspect that he can be said to understand the consequences of yielding the right to counsel. "It is a far different thing to forego a lawyer where a traffic offense is involved than to waive counsel where first degree murder is at stake." Commonwealth v.Collins, 436 Pa. 114, 121, 259 A.2d 160, 163 (1969) (plurality opinion).

Even when the suspected crime is of a far less serious nature, courts have questioned whether a waiver of Miranda rights can be knowing, intelligent and voluntary where the suspect is unaware of the offense upon which the question is based. See United States v. McCrary, 643 F.2d 323,

328-29 (5th Cir. 1981) (unlawful possession of firearms); contra: United States v.Campbell, 431 F.2d 97 (9th Cir. 1977) (unauthorized transportation of an automobile in interstate commerce); State v. Russell, 261 N.W.2d 490 (Iowa 1978) (arson).

No court has held that the failure to inform a prisoner of the offense under investigation is irrelevant in determining the voluntariness of a statement. As the Supreme Court of Connecticut recently observed in State v. Falby, 187 Conn. 6, 444 A 2d. 213, 218 (1982):

> Adequate disclosure is one element of the requirement that a confession is "the product of an essentially free and unconstrained choice by its maker." State v. Derrico, 181 Conn. 151, 163, 434 A 2d 356, cert. denied, 449 U.S. 1064 (1980), ... quoting Culombe v. Connecticut, 367 U.S. 568, 602 ... The word "murder" spoken by a police officer is often a

> potent stimulant to the exercise of such constitutional rights as the right to counsel and the protection against self-incrimination.

Cf., 18 U.S.C. §3501(b) requiring federal courts in determining the issue of voluntariness of any self-incriminating statement made or given orally or in writing to take into consideration all the circumstances surrounding the giving of the statement, including whether the defendant "knew the nature of the offense with which he was charged or of which he was suspected" at the time of making the statement.

This Court in Miranda itself [Miranda v. Arizona, 384 U.S. 436 (1966)] has stated that (id., at 475):

> If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelli-

> gently waived his privilege against self-incrimination and his right to retained or appointed counsel.

Accord: Tague v. Louisiana, 444 U.S. 469, 470-71 (1980); North Carolina v. Butler, 441 U.S. 369, 373 (1979). As this Court admonished in North Carolina v. Butler, 441 U.S. 369, 374 (1979) (emphasis added):

> This is not the first criminal case to question whether a defendant waived his constitutional rights. It is an issue with which courts must repeatedly deal.

It is submitted that the State of Maine did not sustain that burden and that its failure to do so presents this Court with an important and compelling opportunity to further clarify the duties of enforcement officers when a prisoner is suspected of murder and qualifies his willingness to be questioned in the absence of an attorney.

CONCLUSION

For each of the foregoing reasons, petitioner's petition for a writ of certiorari should be granted.

February 21, 1984

Respectfully submitted,

/s/ Oliver C. Biddle
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Counsel of Record
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Of Counsel:

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOHN C. CONDON,

Petitioner

v.

STATE OF MAINE,

Respondent

PROOF OF MAILING

I, OLIVER C. BIDDLE, counsel of record for John C. Condon, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 21st day of February, 1984, forty copies of the foregoing Petition for a Writ of Certiorari were deposited in a United States post office located at 30th and Market Streets, Philadelphia, Pennsylvania, with first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States at the United States Supreme Court, 1 First Street, N.E., Washington, D.C. 20543, within the time allowed for filing.

/s/ Oliver C. Biddle
Oliver C. Biddle

Sworn to and subscribed
before me this day
of , 1984.

Notary Public

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOHN C. CONDON,

Petitioner

v.

STATE OF MAINE,

Respondent

CERTIFICATE OF SERVICE

I, OLIVER C. BIDDLE, counsel of record for John C. Condon, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 21st day of February, 1984, three copies of the foregoing Petition for a Writ of Certiorari were served on the State of Maine, respondent, by mailing said copies in a duly addressed envelope, with first class postage prepaid, to James E. Tierney, Esquire, Attorney General at State House, Augusta, Maine 04333.

/s/ Oliver C. Biddle

Oliver C. Biddle
Attorney for John C. Condon,
Petitioner
30 South 17th Street
Philadelphia, PA 19103
(215) 564-1800

APPENDIX A

MAINE SUPREME JUDICIAL COURT

Reporter of Decisions
Decision No. 3368
Law Docket No. Cum-82-325

STATE OF MAINE

v.

JOHN C. CONDON

Argued September 23, 1983
Decided December 5, 1983

Before McKUSICK, C.J. and NICHOLAS, ROBERTS, VIOLETTE, WATHEN, GLASSMAN, and SCOLNIK, JJ. all concurring Attorneys for the State:

James E. Tierney, Esq.
Attorney General
Charles K. Leadbetter, Esq.
Wayne S. Moss, Esq. (orally)
P.J. Perrino, Jr., Esq.
Assistant Attorneys General
State House
Augusta, Maine 04333

Attorneys for Defendant:
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Daniel G. Lilley, Esq. (orally)
E. Paul Eggert, Esq.

Daniel W. Bates, Esq.
805 Maine Savings Plaza
Portland, Maine 04101

SCOLNIK, J.

The defendant, John Condon, appeals from his conviction for three counts of murder, 17-A M.R.S.A. § 201 (1)(A) and (B) (1983), one count of arson, 17-A M.R.S.A. § 802 (1983), and two counts of theft by unauthorized taking, 17-A M.R.S.A. § 353, 362 (1983) resulting from a jury trial in Superior Court (Cumberland County). On appeal he argues that the court erred in (1) admitting into evidence a tape recorded interrogation of the defendant; (2) admitting certian photographs of the victims; and (3) refusing to instruct the jury concerning the consequences of a verdict of not guilty by reason of insanity. He also maintains that the evidence required the jury to conclude that the defendant was not criminally responsible for his conduct. We find no error and deny the appeal.

On the night of September 28, 1981, Maureen and James Austin, the sister and brother-in-law of the defendant, and their twelve year-old son, Douglas, were killed in their home on Seabourne Drive in Yarmouth. James and Maureen sustained multiple stab wounds and Douglas's throat was slashed twice. In addition, a fire was set in an upstairs bedroom and some jewelry and the family automobile was taken.

Later that night the defendant was stopped by the South Portland

police when he was suspected of operating a motor vehicle while under the influence of intoxicating liquor. He passed the field sobriety tests but was arrested for driving without a license. He was suspected of possible theft of the automobile which he was driving and of jewelry which was found in his possession.

The defendant was then transported to the South Portland police station for processing and questioning. Miranda warnings were read to him prior to his interrogation by Detective Sergeant Sanborn. The defendant made it known that he understood these rights. Although Sergeant Sanborn first learned of the homicides when midway through the interrogation, he was aware beforehand that a body had been found at the Austin residence when a Yarmouth police officer was sent to ascertain whether the defendant had permission to drive the automobile which he was operating at the time of his arrest. At no time prior to, or during, the interrogation was the defendant ever informed that he was a suspect in a murder case. Portions of the taped interrogation, both before and after Sergeant Sanborn was aware of the homicides, were received in evidence at trial.

On October 7, 1981, the grand jury (Cumberland County) returned an indictment charging the defendant with three counts of murder, one count of arson, and two counts of theft. Each of the murder counts accused the defendant alternatively of intentionally or knowingly causing the death of one of

the Austins, or causing death by engaging in conduct which manifested a depraved indifference to the value of human life. Although the defendant entered pleas of not guilty and not guilty by reason of insanity, the central and most seriously contested issue at trial was whether the defendant at the time of his conduct suffered from a mental disease or defect which relieved him of criminal responsibility under 17-A M.R.S.A. §39.

A jury trial resulted in convictions on all counts and this appeal followed.

I.

The defendant first argues that it was error for the presiding justice to admit the taped interrogation into evidence. He maintains that the failure to inform him that he was a murder suspect (1) rendered his statements involuntary and (2) invalidated the waiver of his Miranda rights. We first address the issue of the voluntariness of the statements.

The record is clear that the objection to the admission of the taped interrogation was based solely on the ground that the defendant did not waive his right against self-incrimination. No objection on the basis of involuntariness was voiced in the trial court. We have repeatedly stated that the question of voluntariness is not saved on appeal where a defendant has made no attempt to bring this issue to the attention of the trial justice. State v. Melvin, 390 A.2d 1024, 1030

(Me. 1978); State v. Tanguay, 388 A.2d 913, 915-916 (Me. 1978); State v. Hudson, 325 A.2d 56, 62 (Me. 1974). An objection to the admissibility of a statement grounded solely on a Miranda violation fails to preserve for appellate review the separate voluntariness issue. State v. Melvin, 390 A.2d at 1030. Since the issue has not been preserved, we review the admission of the statement only for obvious error affecting substantial rights. State v. Atkinson, 458 A.2d 1200 (Me. 1983); M.R. Crim. P. 52(b). After a careful review of the record, we find no such error.

We also find no error in the conclusion of the Superior Court that the defendant effectively waived his fifth amendment rights. The record provides rational support for the presiding justice's determination that the defendant knowingly, intelligently, and voluntarily waived his rights after receiving his Miranda warnings. See State v. Bleyl, 435 A.2d 1349, 1358 (Me. 1981).

Miranda v. Arizona, 384 U.S. 436 (1966), contains no explicit requirement that a suspect must be informed of the exact nature of the crime for which he is being questioned. While at least one trial court decision held that a confession is per se inadmissible unless the suspect is informed of the nature of the interrogation, Schenk v. Ellsworth, 293 F. Supp. 26 (D. Mont. 1968), other courts have held that a suspect's ignorance of the exact nature of the interrogation

is but a factor to consider in evaluating the totality of the circumstances in the determination of whether there has been an effective waiver of Miranda. Carter v. Garrison, 656 F.2d 68, 70 (4th Cir. 1981) cert. denied, 455 U.S. 952 (1982). See United States v. McCrary, 643 F.2d 323, 329 (5th Cir. 1981); Collins v. Brierly, 492 F.2d 735, 738-739 (3rd Cir.) cert. denied, 419 U.S. 877 (1974). Subscribing to this interpretation of Miranda, it is our view that the trial justice rationally could find by a preponderance of the evidence that the defendant's waiver was effective. The record contains no evidence of force or intimidation. The defendant acknowledges that he understood all of the elements of the warnings. The interrogation concerning a possible burglary and car theft and a possible homicide did not involve unrelated criminal conduct and crimes. See Carter v. Garrison, 656 F.2d at 70. All of the criminal activity occurred at the same time and place. It is significant that the defendant exercised his right to remain silent when the homicides became the focus of the interrogation. This evidence rationally supports the finding that the defendant effectively waived his rights under the fifth and fourteenth amendments.

II.

The defendant argues that it was error for the presiding justice to admit into evidence two photographs depicting the bodies of the Austins.

As we stated in State v. Joy, "[P]hotographs are admissable if they are true and accurate depictions of what they purport to represent, if they are relevant to some issue involved in the litigation, and if their probative value is not outweighed by any tendency they may have toward unfair prejudice," 452 A.2d 408, 412 (Me. 1982), quoting State v. Crocker, 435 A.2d 58, 75 (Me. 1981). Conceding that the photographs are both relevant and an accurate depiction of the bodies, the defendant argues that their probative value is minimized by the admission of testimony and drawings which described the cause of death and the number and location of the stab wounds. He then maintains that the gruesome nature of the photographs compels a conclusion that their probative value is outweighed by their tendency toward unfair prejudice. We disagree.

The photographs, though gruesome, served both to clarify and to corroborate the medical testimony. See State v. Crocker, A.2d at 75; State v. Woodbury, 403 A.2d 1166, 1169 (Me. 1979). They also assisted the jury in its determination of whether defendant engaged in conduct manifesting a depraved indifference to the value of human life. See State v. Crocker, 435 A.2d at 75; State v. Conwell, 392 A.2d 542, 544 (Me. 1978).

The trial judge "has great latitude and discretion in determining the admissibility of photographs and unless there is shown an abuse of discretion, his ruling will not be disturbed on [appeal]." State v.

Crocker, 435 A.2d at 76. (citations omitted.) We find no abuse of discretion on the part of the presiding justice.

III.

The central issue of the trial was the defendant's mental condition at the time of the commission of the crimes. The defendant has a long history of manic-depression, and according to the medical testimony at trial, he was, at the time of the killings, either in the midst of a manic episode or at the beginning of a manic phase. Based on this evidence, the defendant asserts that a rational jury could not fail to find by a preponderance of the evidence that he was not criminally responsible for his conduct.

Under 17-A M.R.S.A. § 39(1) (1983), a person lacks criminal responsibility if, "at the time of the criminal conduct, as a result of mental disease or defect, he either lacked substantial capacity to conform his conduct to the requirements of the law, or lacked substantial capacity to appreciate the wrongfulness of his conduct." Whether a defendant lacked criminal responsibility is a question of fact. State v. Foster, 405 A.2d 726, 730 (Me. 1979); State v. Gatcomb, 389 A.2d 22, 25 (1978). The burden is on the defendant to prove by a preponderance of the evidence that he was not criminally responsible for his conduct. State v. Buzynski, 330 A.2d 422, 431 (Me. 1974); 17-A M.R.S.A. §

39(1) (1983). The jury verdict will be disturbed only upon a strong showing that no reasonable fact finder could conclude otherwise than that the defendant lacked criminal responsibility for his conduct. See State v. Ellingwood, 409 A.2d 641, 646 (Me. 1979).

Although there is expert testimony that the defendant lacked criminal responsibility for his acts, such testimony was contradicted by Dr. Ulrich Jacobsohn who testified that although the defendant was at the beginning of a manic phase at the time of the killings, his condition had not approached a psychotic level. He further opined that the defendant neither suffered from mania nor depression on that day. Even where expert testimony is uncontradicted by other expert evidence, the fact finder is free to reject the expert opinion of a psychiatrist. State v. Boone, 444 A.2d 438, 444 (Me. 1982); State v. Ellingwood, 409 A.2d at 644. The jury is entitled to draw its own ultimate conclusions where the facts and assumptions underlying expert opinions are amply exposed at trial. See State v. Ellingwood, 409 A.2d at 644. In the present case, not only were the underlying facts and assumptions of the psychiatric testimony exposed at trial, but the expert testimony was in direct conflict. In addition, evidence of defendant's conduct contradicted the exculpatory expert testimony. Thus, there was sufficient evidence from which the jury reasonably could conclude that the defendant was criminally

responsible for his conduct, and the verdict must stand.

IV.

As the final point on appeal, the defendant assigns as error the court's refusal to instruct the jury concerning the consequences of a verdict of not guilty by reason of insanity. We have repeatedly stated that whatever may transpire after the verdict is not the concern of the jury. State v. Ruybal, 398 A.2d 407, 415 (Me. 1979); State v. Dyer, 371 A.2d 1079, 1083 (1977). No sound reason has been advanced for altering our view.

The entry is:

Judgment affirmed.

DISPOSITION:
The entry is:
Judgment affirmed.

APPENDIX B

STATE OF MAINE
CUMBERLAND, ss

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
Law Docket No.
Cum-82-325

STATE OF MAINE :
:
vs. : ORDER
:
JOHN C. CONDON :

Upon motion of appellant's counsel for reconsideration, and upon motion of appellant pro se for enlargement of time in which to file a motion for reconsideration pro se.

It is ORDERED that the motion for reconsideration be, and it hereby is, DENIED. The motion for enlargement of time is hereby DISMISSED as being unnecessary.

Dated this twenty-first day of December, 1983.

For the Court,

Chief Justice

APPENDIX C

SOUTH PORTLAND POLICE DEPARTMENT
South Portland, Maine 04106
Detective Division

REPORT OF INVESTIGATION

Complainant/Victim	Comp. No.
James Austin, Maureen Austin, Douglas Austin	none
Type of Case	**Date & Time of Occurrence**
Homicide	9-28-81 0404 hours

Narrative: GIVE A SYNOPSIS OF CASE INVESTIGATION SUBSEQUENT TO THE REPORT, WITH PERSONS INTERVIEWED, NEW LEADS, AND OTHER INFORMATION ON CASE PROGRESS

The following was transcribed from a tape, that was recorded on 9-28-81, at 0404 a.m., in my office at the South Portland Police Department. The persons present were Lieutenant Frank Toderico, myself and John C. Condon, d.o.b. 11-19-47.

Sanborn: Okay, Son. Your real name is not Son, but it's John?
Condon: Yeah.
Sanborn: And your last name is what?
Condon: Condon, C-O-N-D-O-N.
Sanborn: Okay, and your middle initial?
Condon: J. C.
Sanborn: Okay, are you a Junior, John, ah, Son?
Condon: No, I'm not.
Sanborn: Okay. I'm Detective Sergeant Sanborn...

Condon: Okay.
Sanborn: South Portland Police Department, and this is Lieutenant Toderico.
Condon: Puerto Rico?
Toderico: Toderico.
Condon: Oh. (mumbled)
Sanborn: Okay. Now, what I want to do is give you your Miranda warning so that you understand. I understand that you have already been informed of what your rights are. I want to re-state your rights. Okay?
Condon: Yeah. (mumbled)
Sanborn: I am a Police Officer. I warn you that anything you say can be used in a court of law against you. That you have an absolute right to remain silent. That you have the right to the advice of a lawyer before, and the presence of a lawyer here with you during

[page 1 of 30]

questioning, and if you cannot afford a lawyer, one would be furnished for you free before any questioning if you desire. Do you understand each of your rights?
Condon: Um, hum.
Sanborn: Are you willing to talk with us without having an attorney present
Condon: To a certain extent, yeah.
Sanborn: Okay. Okay, you can refuse to answer any question that you choose to and refuse to answer it. Okay?

Condon: (no verbal acknowledgement)
Sanborn: I can only assume based on the information that I've been given at this point, Son, that you were over in Yarmouth earlier and obtained a motor vehicle?
Condon: Um, hum.
Sanborn: What kind of a car was that
Condon: It was a Chevy; some kind of a Chevy.
Sanborn: Some kind of a Chevy. Who, who owns that?
Condon: My brother-in-law Jim Austin, Jimmy Austin.
Sanborn: Okay. And, ah, that's got dealer plates on it?
Condon: Yeah. I guess it does. Yeah.
Sanborn: Okay. Where does he work?
Condon: Chevrolet.
Sanborn: He works for Chevrolet?
Condon: He works for Chevrolet, represents Chevrolet, headquarters in Boston, I think.
Sanborn: So he works for headquarters in Boston? He doesn't work for a local, local dealership?

[page 2 of 30]

Condon: No, he used to. Ah, he used to have an office in Portland, but the company trimmed down, and knocked the Portland office out, cancelled it and made it in Boston, so, but he covers the, ah, Portland area, including all the way to Sebago Lake down to Forest City Chevrolet. He sells cars to the dealers.
Sanborn: Okay.
Condon: I think. I think that's what he does. I've ridden around

with him a couple of times, and I think that, that, ah, he represents the company and ah tries to find out what these guys want for cars, and he tries to sell them other kind of cars too, and mostly a head job, I guess to the dealer. It used to be pretty easy, but how it is now, I don't know.

Sanborn: Okay. Now, he's your brother-in-law, right?

Condon: Yeah.

Sanborn: This Austin, and he's married to your sister?

Condon: Sure is. Fifteen, sixteen years.

Sanborn: Okay. Ah, what's your sister's name?

Condon: Maureen.

Sanborn: Maureen?

Condon: Janet Maureen.

Sanborn: Janet Maureen. Okay, and where do they live in Yarmouth, Son?

Condon: Seabourne Drive.

Sanborn: Seabourne? Okay. The, ah, what time were you over there to get the car?

Condon: I was over there about 10:30 tonight.

Sanborn: All right. So, this is the early morning hours Monday morning

[page 3 of 30]

on the 28th, so you were over there around 10:30 on the 27th, Sunday night?

Condon: Yeah.

Sanborn: Okay. How did you happen to get that car?

Condon: I asked them for it.

Sanborn: Okay.
Condon: They said yeah take it.
Sanborn: All rights, so...
Condon: We had a little discussion about my activities of the past week and so, but as long as I wasn't drinking, and, ah, they said take the car.
Sanborn: Okay. You been drinking tonight?
Condon: Hell, no.
Sanborn: All right.
Condon: I'm an alcoholic, ...I don't drink.
Sanborn: Okay. Um, you're talking with him about your past activities. What have you done in the last week or so that has caused him some concern?
Condon: I've been arrested a couple of times. Two or three times. I have a hassle about a law.
Sanborn: Okay.
Condon: I'm getting tired of it.
Sanborn: Okay. I can understand that. Nobody likes to get arrested a lot.
Condon: I get thrown in jail everywhere I go. Everywhere I turn.
Sanborn: Well, it gives you an opportunity to meet us, and ...

[Page 4 of 30]

Condon: Yeah, but I'd rather meet the girl I was going out to see. You know what I'm talking about?
Sanborn: Okay. I can understand that
Condon:

Sanborn: You say that you've arrested a couple, three times in the last week or so?
Condon: Yeah.
Sanborn: Where were you arrested?
Condon: Once in Old Orchard, in Old Orchard once, and, ah, in my own apartment.
Sanborn: You were arrested in your own apartment?
Condon: Yeah, I called the police to have somebody else arrested, and they came up to talk with me, and, ah, lo and behold, I was the one that went to jail.
Sanborn: Okay. Where's your apartment?
Condon: Executive Inn, in Portland.
Sanborn: Okay. The hotel there?
Condon: Yeah, The old hotel. I don't live in one of the modern room. Western ... It's the Best Western Inn. You know. They have motel rooms there.
Sanborn: Yeah.
Condon: I live in the old part.
Sanborn: The old part?
Condon: Yeah, it has 32 apartments in the whole building?
Sanborn: Okay.
Condon: But they've been re-furnished. They're really nice. Air conditioning.
Sanborn: So you said you were arrested in your own apartment; you were

[Page 5 of 30]

arrested in Old Orchard?
Condon: Yeah.
Sanborn: Where else were you arrested?
Condon: That was it.
Sanborn: That's it?
Condon: Yeah.

Sanborn: Okay. Ah, I'd heard that you had been arrested in Scarborough.

Condon: I guess it was Scarborough.

Sanborn: It wasn't Old Orchard, it was Scarborough?

Condon: Yeah. I guess so. I don't know that area too well. I drove down to Old Orchard with my motorcycle, and it broke down, and, ah, I was heading on the way out.

Sanborn: You own a motorcycle?

Condon: Yeah.

Sanborn: Where is your motorcycle right now?

Condon: Ah, Al Martin has it; the locksmith in Portland.

Sanborn: Okay. How did you get out of Yarmouth to get the car?

Condon: Hitchhiked.

Sanborn: You hitchhiked out there?

Condon: Yeah.

Sanborn: Okay. And you got there at about what time?

Condon: I guess about 10:30, 11:00 as I remember, because I wear a good watch, you know, and I always check the time.

Sanborn: Okay.

Condon: I'm sure it was 10:30, 11.

Sanborn: All right. So how long did you stay out there?

Condon: I'll say around 11. Huh?

[Page 6 of 30]

Sanborn: How long did you stay out there?

Condon: Oh, very short. My sister, ah, and my brother-in-law, I haven't ah, haven't seen them in about a month and a half and, ah, it's a touchy relationship, that's all I got to say.

Sanborn: Okay.

Condon: It's a touchy relationship because, ah, my mother was an alcoholic, my father, my dad was an alcoholic, I found out that I was an alocholic seven months ago, lo and behold, much to my amazement and, ah, that it wasn't something else. And, ah, ah, so I've put them through some trials, and my mother put them through some trials. They're a very American, good American family, you know. They really believe in America, and hey, I get into trouble w/ the law & they don't like that. They don't want to be associated with it, you know. And they're just like, ah, hey, you know, they told me this time if I ever get in trouble this time they said don't come over here. They've always helped me in the past.

Sanborn: Okay. They've helped you out of these previous arrests, then?

Condon: Yeah.

Sanborn: That's why they wanted to discuss it with you when you came over to get the car?

Condon: Ah, you might say that. Yeah.

Sanborn: They're involved as far as getting you bailed and so on?

Condon: A little bit, yeah, yeah, a very, you know.

Sanborn: Okay. Did you get into an argument with them over it, Son?

Condon: Naw.

Sanborn: Okay. Who was discussing it with you, your sister or your brother-in-law?

[Page 7 of 30]

Condon: Well, I think I woke them up, because, ah, 10:30; they go to bed early, and, ah, Jim came down and answered the phone and I told him that I was in a little bit of trouble, and I got thrown out of the Executive Inn now, the place where I live, tonight because I got in a fight there, with a guy, and, ah, the police came up to my apartment, and, they were with the bouncers from the discotheque, and, ah, evicted, and they just said look, got out of here, man, you know, you're out of this hotel. You're out, you know. Said come back, give a call in a day or so to pick up your stuff. You know, we've have enough. And so, but then there was a girl there with me, my girl-friend. We were fucking around, & they fucking arrester her, man & she was drunk because I just got out of jail myself tonight. I mean last night.

Sanborn: Okay.

Condon: And, ah, she had been drinking and, ah, she started, I think she kicked the police officer, which wasn't too smart. And I told her to just you know, to wise up, and, ah, she didn't. So

I, they told me, I left. They wanted the key to my apartment; I gave it to them. They said leave. I said thanks a lot. We'll see you later. I left. Mother fucker I did. And, ah, I went out and right out and I walked down to Forest Avenue, and got on 295, & hitchhiked straight to mother fucker Yarmouth. I got caught in the rain a little bit, and, ah, ah, you know, went out and rang my sister's doorbell and fuck, what was I going to do, man?

Sanborn: Um, hum.

Condon: A lot of trouble. I was talking to someone. They didn't, you know, they knew, you know, they just said, you know, like, you want to see this girl tonight. You want to have the car for a

[Page 8 of 30]

couple of days. Fine. Take this. We'll take a couple days off or something. You know. We have Maureen's car, you know. I don't know why they didn't give me Maureen's car. Maybe there was something wrong with it. I don't know. That is surprising 'cause he's not supposed to give me his, ah, his company car, I just found out.

Sanborn: Okay.

Condon: Anyway. So I said fine. He said don't, ah, you know, just come back and we'll check in when things cool

off, we'll check in. And see my motorcycle is, ah, in... Al Martin has it and I got to come up with 100, and, ah, ah, well, he's... I've got to come up with some money to, ah, to, ah, get my motorcycle from Al Martin.

Sanborn: Did you ask your brother-in-law for the money?

Condon: No.

Sanborn: You didn't?

Condon: No. I wouldn't do that. She told a long time ago never to ask for money.

Sanborn: Your sister told you not to ask for money?

Condon: A long time ago. Four or five years... My mother was pretty rich.

Sanborn: Where does you mother live?

Condon: She's dead. She died of alcoholism.

Sanborn: Sorry to hear about that.

Condon: Well.

Sanborn: Is your father living?

Condon: No, he's dead.

Sanborn: Okay. So it's just you and your sister now?

[Page 9 of 30]

Condon: Yeah.

Sanborn: No other brothers or sisters?

Condon: I have a cousin, nephew, I mean. Doug.

Sanborn: Okay. That's you sister's boy?

Condon: Yeah.

Sanborn: Okay. Who was home when you went over to get the car?

Condon: Jim and Maureen.

Sanborn: How about the boy?

Condon: I don't know. He was probably asleep. I didn't go upstairs.

Sanborn: You say you discussed having been arrested with them about the previous arrests?
Condon: Yeah. I told them.
Sanborn: And they were quite concerned?
Condon: Yeah. They were. Yeah.
Sanborn: Is your sister the type who's very argumentative with you?
Condon: No. Just.. No, not generally. No.
Sanborn: Did she act disgusted with you about the previous arrests?
Condon: No. She just went like, you know, sorry, we can't help you. Jim said, look, take the car for a while, you know, that's the best we can do.
Sanborn: Okay...
Toderico: Excuse me. Who bailed you out.
Condon: Al Martin.
Toderico: Martin put up the money?
Condon: Well, somebody did. I don't know. Al Martin got a bailer.
Toderico: Yeah.
Condon: He knows the Sheriff, and he pulled some strings, and I was out.

[Page 10 of 30]

Toderico: How long has your mother been dead?
Condon: She's been dead since 1975.
Toderico: Does your sister have any keepsakes from her? Any jewelry?
Condon: Oh yeah.
Toderico: Jewelry. So your sister would have got that as part of the estate, or
Condon: She agreeds to... what?
Toderico: In other words, did, when your mother died the estate...

Condon: My sister got half, I got half. I got better jewelry than she did.

Toderico: Oh. Is that right? Antique stuff?

Condon: Well, this is how that went, my mother loved jewelry. She remarried a guy who was very prominent in business.. very. And she, he died with about a million bucks. And, ah, after he had left a couple of hundred thousand apiece to his, ah, own two kids, ah, ah, he left the rest to my mother, and she was an alcoholic, and when she died... (phone rings)... (continuing on).. When she died, my mother died in 1975 of alcoholism; she just died in her room, ah, ah, alone, as usual, and, ah, with all the whiskey bottles around, and, ah, the funeral went, and the will came, and we had a big thing with the lawyers and appraisals and all this shit, and, ah, ah, a lot of money involved, but much, ah, it turned out to be much less than I thought it was. But, anyway, I got, ah, ah, I got half of everything. I went around and chose everything, half, including the furniture. And then I said fuck this shit, man, I said I don't want all this furniture. So I sold it to my sister for 5,000.

[Page 11 of 30]

Sanborn: Um. hum.

Condon: And.. but I kept the jewelry.
Sanborn: Okay.
Condon: And my sister got a bunch of it too.
Sanborn: Where's your jewelry?
Condon: I sold that a long time ago.
Sanborn: Okay. But you no longer have any of the...
Condon: I had a rock. I sold it for... I sold one ring for 3,000, and it was worth 7,000, and it's probably worth 21 now.
Toderico: But your sister kept her's.
Condon: Three carats? Huh?
Toderico: Your sister kept her's, her portion of the jewelry?
Condon: Of course, yes, she keeps everything, man. She don't.. she.. this woman's something else. My sister is, is okay. You don't pull the wool over, you don't pull the wool over my sister's eyes. No, she saves everything, including every dollar that, ah, I inherited 65,000 dollars cash, ah, after the funeral, and my sister still got that.
Sanborn: Yeah.
Condon: Earning interest. And that's almost...
Sanborn: Would it be fair..
Condon: (mumbled) (interrupted).
Toderico: I'm sorry.
Condon: Maybe she, ah, inherited 120, 30 thousand.
Sanborn: Would it be fair to say that your sister is well-to-do, she and her husband?
Condon: If you think that, ah, having a bank account, I would estimate in certain places,

she's got them in California, and she like to

invest in different places, ah, and in Chevrolet and General Motors, ah, I would say that her net worth, her, he has nothing to do with it.

Sanborn: Okay.

Condon: She runs the house. Well, yeah, she runs the house, and, ah, if it comes down to a two-way street, they go, ah, Maureen's way, and, ah, ah, Maureen loves Doug and wants him to send him to college, and as you know, colleges cost around 10 grand a year, and, ah, this kid's smart, and, ah, she's, ah, I would say that, ah, she's got, ah, with all the interest accrued, 160-170,000 some place. Unless she's spent it some place where I don't know. And I'm tell you, she doesn't share her business with me, but I asked...

Sanborn: Does it irritate you that she's as well off as she is?

Condon: No, not at all. I've got the same amount. And more. Because my mother liked me more than she did my sister.

Sanborn: Okay.

Condon: I got more.

Sanborn: Okay.

Condon: But I, ah...

Sanborn: Do you argue with your sister?

Condon: No. I only had one argument.

Sanborn: How about with your brother-in-law?

Condon: No.

Sanborn: So. they're good people. You don't have any problems with them at all.

Condon: No.

Sanborn: Okay. How did you happen to get the blood on your hands?

[Page 13 of 30]

Condon: Well, I got in a fight tonight. Okay, and I hit a guy once, I think, with my fists, and kicked him twice, and that was it. And my hand, as you can see, is already swollen up from, ah, well, if you took this bandage off, you'll see, ah, six stitches there, and I ain't kidding you. I lost a lot of blood.

Sanborn: Who put the stitches in?

Condon: I don't...I'll take this ace bandage off, but, ah, a Doctor DeFanta, DeFanti. I'll take this bandage off, but I don't want the other one to get infected. He said it could be very serious if it got infected. So it's. You'll be able to see it. It's right under there.

Sanborn: When did that...All right... okay. When did that happen?

Condon: When the fuck did this happen? This happened when I wrecked my fucking bike, ah, what's today's date? If I had my watch on..

Sanborn: Today's the 28th, Monday, the 28th. Yesterday was Sunday, the 27th.

Condon: I think it was, ah, Friday night, I think. I'm not

really sure. whatever night I was arrested by the SS, the ah, who are they? Scarborough Police?

Sanborn: Scarborough Police?

Condon: Yeah. Whatever night that was, that was the night, if it wasn't, you know, like, 1:00 o'clock in the morning, it was, you know, like, I think they arrested me at one, and I wrecked it around eleven.

Sanborn: Yeah.

Condon: Somethin like that. And then at about six, I was in Maine Medical Center.

Sanborn: Okay.

Condon: At about nine, seven, eight or nine, I was in Cumberland County

[Page 14 of 30]

jail, and I just got out.

Sanborn: Okay.

Condon: I just got out of there. And so, that's what I've done the last few days.

Sanborn: Did you call your sister and brother-in-law to bail you out?

Condon: No, I didn't. No.

Sanborn: Okay. So, the only call you made was to, ah, that shirt's got to go, right?

Toderico: Yeah. I need that shirt.

Condon: Okay.

Sanborn: The, ah,

Condon: Oops, I don't get no shirt, man?

Toderico: No, that's the best we can do right now, but you still have the blanket, though.

Condon: You did a good job on it, okay?

Toderico: Yeah, not too bad.
Sanborn: Okay.
Condon: T-shirt?
Toderico: I don't have anything right now. We'll get you something else. We'll do the best we can.
Condon:
Sanborn: When you were arrested the only person, then, you called for bail was Al Martin?
Condon: No. Ah, this fellow named Dan, matter of fact the fellow I got in a fight with tonight was supposed to get me out.
Sanborn: Is that why you got into the fight with him? 'Cause he wouldn't ...

[Page 15 of 30]

Condon: Well, well, he, yeah, the reason I got in it with him was he, ah, I told him where my Harley Davidson was. I gave him some money that was in my account in the jail. Ah, my girlfriend gave him, ah, ah, a couple of hundred bucks, or a hundred bucks, and he went off to, ah, find out where the bike was towed to, Old Orchard, it had to be, and, I, and evidently I don't know what happened because I was in jail. He said he was going to do this and he'd have me out at eleven yesterday morning and then by eleven, I wasn't out, and, ah, by six, mother fuck, I wasn't out either. And I said fuck this guy. He's gonna get it. And, I hate

people telling me I'll be out by eleven and I'm waiting at eleven and nothing happens, nothing happens. And at six nothing happens. So, finally, Karen, my girlfried, ah, went to see Al Martin, told him the story and he come down and, ah, he said he'd let me out by nine.

Sanborn: Okay. So Al Martin...

Condon: But this guy, the reason I got in a fight with this guy is Al Martin told me that he was riding my Harley Davidson all around town.

Sanborn: Okay. Martin was out riding your...

Condon: No. That first guy Dan.

Sanborn: Dan.

Condon: I don't know his last name.

Sanborn: Okay. Now the only, one and only time you've been over to your sister's house in the last...

Condon: Month and a half, I'd say.

Sanborn: ... month and a half was last night.

Condon: Yeah. Can I have one of those?

[Page 16 of 30]

Sanborn: Certainly.

Condon: Thank you.

Sanborn: Was last night at about 10:30.

Condon: Yes. Last night about...

Sanborn: What time would you have left? You got there..

Condon: I left there at eleven, or 11:15, 11:15, I think, I wear a watch with the light on it.

Sanborn: So, you got there at 10:30, you left at 11:15. You're sure of that time because you looked at your watch?

Condon: Yep, yep.
Sanborn: Are you sure of time that you stayed?
Condon: Yeah.
Sanborn: And that you got there?
Condon: Yeah.
Sanborn: 'Cause you looked at your watch when you got there?
Condon: No.
Sanborn: Okay. How did you know it was...
Condon: I think it was, yeah, I think I might have, I don't know. I think it was around 10:30. I remember seeing 11:15 for sure, as I was going out the, before I left the, you know.
Sanborn: Were your sister and brother-in-law both awake?
Condon: Oh yeah.
Sanborn: And were they both up with you?
Condon: Yeah. They were both down in the study, down there.
Sanborn: Just, ah, what did you talk about for 45 minutes?
Condon: Oh, the past and, ah, was I drinking, and, ah...
Sanborn: Okay. You say you had not been drinking, right?

[Page 17 of 30]

Condon: No.
Sanborn: When was the last drink you had, Son?
Condon: Seven months ago.
Sanborn: Okay. You haven't had a drink since?
Condon: No.
Sanborn: Okay. Do you take drugs?
Condon: No.
Sanborn: Okay. Are you on any type of medication?
Condon: No.

Sanborn: Okay. You, ah, so you're talking with your sister about your past.

Condon: Yeah. And, ah, you know, I told her I was leaving town, you know.

Sanborn: Where were you headed?

Condon: Well, tonight I was headed over to see my girlfriend named Sunshine.

Sanborn: Where does Sunshine live?

Condon: I don't know. I just have a phone number. I can give that to you. And then I was going to talk to her and we were going to get together, and I was going to together and get this 200 bucks together by calling up this guy in Boston, who's my banker down there. You see, I still have $44,000 down there.

Sanborn: Okay.

Condon: Because I'm not forty years old yet. My mother left it in the will that don't get it until I'm forty. I think my sister is over forty, 'cause I'm thirty-three. No, she's not over forty, but somehow she manipulated to get it all. I think. I don't know. I don't know her business. She did'nt tell me, and I don't ask. She would probably tell me, but I don't ask. I think I asked one time, and she said it's none of your business. 'Cause she never

criticize the way I used my money.

Sanborn: Okay. You go your way and your sister goes hers?

Condon: Yes. As long as we don't fucking bump heads.

Sanborn: Yeah.

Condon: You know, and I've learned that.

Sanborn: Okay. Now when you bump heads, you, you and she...

Condon: We've only bumped heads once, and that was about, ah, a year and a half ago. She called me a nothing. This is when I was drinking, and called me a nothing, and that really pissed me off, and I called, called her a fucking bitch, and all this, and I was in her house, Jim wasn't there, Doug wasn't there, so I stormed down to the basement, and she actually got on the phone, I think and was calling the police, and I called her a fucking bitch, you know, and all this shit. I had a bottle of wine down there and she didn't know ah, and then Jim came home. Nothing was fucking said for two hours. I sat down there. Then Doug was home. For three or four hours, nothing was said between me and her. And Doug came down with some of his friends and all this shit. And then Jim came home, and we all had dinner together. You know, a very tight scene, and then I announced to Jim, I said, Jim, I said, I had a real terrific fight with Maureen

today, and, ah, we discussed it, and Maureen didn't want to discuss it, and this and that, so that was about it, you know. You know, I apologized. But it was, you know, quite a, quite a fight.

Sanborn: Quite a fight?

Condon: Well. Quite an argument. My sister and I never had my sister nor nobody call me a louse.

[Page 19 of 30]

My sister, people have called me a louse, but not my sister. The only person I have left. And little did I know, she was right at the time.

Sanborn: Has she, ah, has she got a fiery temper?

Condon: No, you know, no.

Sanborn: Okay.

Condon: No.

Sanborn: But when you get her irritated and she has the ability of...

Condon: She's very, ah, strong, ah, spoken.

Sanborn: Okay.

Condon: We WILL do this or that is, you know. That's her final statement, only thing is, she'll stall him off and she's got the fucking money to do it her own way anyway, so, you know.

Sanborn: Do you have a fiery temper? Do you did you do?

Condon: Yeah, later I have, pissed off at the guy that was riding my Harley, pissed out at the guy who stole my

wallet, and I had 250 bucks in it, and I couldn't bail myself out with 50 bucks, because I didn't have it, and, ah, I got picked up in Scarborough, you know. So I thought I'd get my girlfriend and take off for a while.. Go down to Boston, talk with this banker, and sit down there and start paying these fines as they come. I've got a lot of fines coming up.

Sanborn: That really infuriated you, didn't it. Nobody was that willing to help you out.

Condon: No. No. I was very happy that I was free. Whistling a tune down that fucking road, man.

[Page 20 of 30]

Sanborn: A minute ago, you said you were irritated. Now you're saying that you weren't irritated.

Condon: That was before, you know, when I was arrested, when I was in jail, you know, I don't like being in jail.

Sanborn: I don't blame you.

Condon: But, but, you know, but, hey, I'm not going to fuck with a cop. I've learned my lesson, you know. I had been arrested before, and I won't go into it.

Sanborn: Okay.

Condon: But, ah, and I, and I've chosen to push a cop, and he's chose to push me back, and, ah, so have about ten others as it turned out, you know, and I've been arrested,

I've been arrested and after that and before that, you know. And ah, you just don't go pushing cops around.

Toderico: I'd say he's been, you've been very cooperative with us tonight.

Condon: Yeah.

Toderico: You couldn't ask for better cooperation.

Condon: well, Thank you.

Toderico: Almost like you're glad everything you know.

Condon: I'm happy I'm out of here, but, ah, this is all a bust that's going on here. Detective Sergeant...

Sanborn: The knives that they... excuse me?

Condon: I said Detective Sergeant here.

Sanborn: I found you very cooperative so far.

Condon: I know.

Sanborn: Okay. Ah, the knife that Lieutenant Toderico found in your possession tonight, ah, the one that fell out of your pant leg

[Page 21 of 30]

when you first got here to the station. Okay?

Condon: Yeah.

Sanborn: Ah, what do you use that knife for?

Condon: I just got it tonight.

Sanborn: Where'd you get that?

Condon: Al Martin.

Sanborn: He gave it to you?

Condon: No, I bought it from him.

Sanborn: You bought it from him?

Condon: Yeah, about one o'clock this morning. No, that's not the

truth, about, when I got out of jail, about nine.

Sanborn: About nine o'clock?

Condon: Yeah. You can ask him. I bought it about nine or ten o'clock when I got out of, as soon as I got out.

Sanborn: That was Sunday?

Condon: Yeah.

Sanborn: Okay.

Condon: Today Monday?

Sanborn: Today's Monday.

Condon: Okay.

Sanborn: So you got out of jail yesterday morning or, ah, last night.

Condon: Yesterday, last night.

Sanborn: All right, so you got out of jail at nine, and you ended up going over to the, your room at the Executive Inn?

Condon: Yeah:

Sanborn: You got into a fight over there.

Condon: Yeah. Just before I got into my elevator.

[Page 22 of 30]

Sanborn: Okay. So then you left from there?

Condon: Yeah.

Sanborn: And you hitchhiked out to your sister's ?

Condon: Yeah.

Sanborn: Okay. Now, you weren't in the best of humor at that point then after just coming from a fight?

Condon: Well, that's because I just, because there were six cops in my apartment again. And I had just gotten out of jail and I told they were going to

book me again for assault and battery on this dude.

Sanborn: Yeah?

Condon: I can fight. You know.

Sanborn: Yeah.

Condon: And, ah, you know, I was very happy they were going to let me go. And I said mother fuck you, I didn't say it to them, I said as long as mother fuck, if you let me, I'll dance down those stairs in a hurry.

Sanborn: Yeah?

Condon: And I'll let her stay up there.

Sanborn: Okay. Did you tell your sister about the fight that you just had?

Condon: No.

Sanborn: Did you tell your brother-in-law?

Condon: No.

Toderico: They didn't ask you about the cut on your hand?

Condon: Oh, they knew that because I told them about the motorcycle.

Toderico: No. But I mean the fresh cut.

[Page 23 of 30]

The cut that you said you got from your hitting the guy, you said.

Condon: I could have gotten it from that. I don't know. Look at my hand. I got so many fucking cuts, I don't know; some are old, some are new.

Toderico: How did you get the fresh cut on your right leg?

Condon: I don't know where I got that.

Toderico: Because that looks like thats fairly fresh; it wasn't from the accident?

Sanborn: There's some fresh blood on that knife, isn't there?
Condon: I don't know.
Sanborn: How would you have gotten fresh blood on the blade of that knife?
Condon: I don't know. I don't remember getting blood on that knife at all.
Sanborn: Okay. You didn't use that knife, that knife during that fight at the hotel?
Condon: No.
Sanborn: Okay. Did you show your sister or your brother-in-law the knife?
Condon: No.
Sanborn: Okay. To the best of your knowledge, Son, is, what is the health and well-being of the people, your sister and your brother-in-law over there on, what is it, Seabrook Road, did you say?
Condon: Seabourne Drive? in Yarmouth.
Condon: Yeah. What, how they doing? Fine. They looked okay to me. Healthy.
Sanborn: They, ah...

[Page 24 of 30]

Toderico: How old's the boy?
Condon: He's eleven, I think. Eleven or twelve. He's eleven.
Toderico: And, you know, you didn't see him at all while you were there?
Condon: No. No.
Toderico: Is he that sound a sleeper that he wouldn't have heard you people discussing the car or anything?
Condon: I guess. He sleeps upstairs; we were downstairs.

Toderico: Were they awake when you got there, or did you have to wake them up?
Condon: I think I woke them up.
Toderico: You woke them up? And when you left, they were still awake and boy was still asleep, as far as you know?
Condon: Huh?
Toderico: In other words, when you left, with the car, you left them, what, in the kitchen or...
Condon: Well, my brother-in-law was awake because he was dressed. He had his shoes on and all that fucking shit. My sister had a nightgown.
Sanborn: Okay now earlier, Son, you said that, that you must have awakened them, because when you got there, the house was dark.
Condon: Yeah. But, by the time he came downstairs, ...
Sanborn: You think that he got up, got dressed, and got his shoes on?
Condon: I don't know, I guess, ah,...
Sanborn: Were they irritated that you were at the house?
Condon: No.
Sanborn: Waking them up?
Condon: No. Well, you know, a little bit, anybody would be when woken up.

[Page 25 of 30]

Sanborn: Okay.
Condon: But, you know, when my sister realized it was me, she was willing to listen.
Sanborn: Okay.
Toderico: Did you ring the bell or...
Condon: Yeah.

Toderico: Or did you beat on the door?
Condon: I rang the bell.
Toderico: And they came right down?
Condon: No. It took quite a while.
Toderico: Took quite a while for them to come down?
Condon: Yeah. Maybe five or ten minutes.
Toderico: And they didn't call out, who's there, or are they in a habit of..
Condon: No. The light finally came on in the den, and I was at the front, the very front door, and I said hey, Jim, it's Jay. And I went around, and he said, "oh", and I opened the door.
Sanborn: They call you Jay?
Condon: Yeah.
Sanborn: Okay. Son is a name that you've assumed?
Condon: Well, it's my nickname, Son.
Sanborn: How'd you happen to get that name?
Condon: No, I, I really couldn't tell you. It just came about.
Sanborn: Okay. You a member of a motorcycle gang or anything?
Condon: No. No.
Sanborn: Okay. I didn't know whether, I saw the tattoo on your arm saying Son.
Condon: Yeah.

[Page 26 of 30]

Sanborn: I thought maybe that was part of the initiation into a motorcycle gang, or something.
Condon: No.
Toderico: But you're friendly with Jake Sawyer.
Condon: I know Jake, yeah.
Toderico: You know Jake, you know Al.

Condon: Yeah. I met him once. Once, yeah. Twice now.

Toderico: You met him once and he bailed you out, or he got someone to bail you out?

Condon: No. I've met Jake once. I know Al Martin.

Toderico: Oh.

Sanborn: You've ever taken anyone's life, Son?

Condon: No. Never. No. Why did someone knock off my sister, or something?

Sanborn: Well. I don't know. Why don't you tell me.

Condon: Well, it sounds like somebody did.

Sanborn: Why would you, why did you say that?

Condon: Because I heard homicide on the fucking radio. I ain't no dummy. What am I doing here with the Detective Sergeant for a fucking, if it's a stolen car, or something? Big deal. Something's going on here. Can I have another cigarette?

Sanborn: Yeah.

Condon: I'm not going to open my mouth too much about that. Jesus Christ. You know, that's serious shit... (mumbled)... hurting someone.

Sanborn: Well, if someone did knock off your sister, and you're the one who brought up someone knocking off your sister, you may have more information about it than I at this time, Son.

Condon: No. I don't.

Sanborn: Okay?
Condon: No.
Sanborn: Like you said, you're not going to say too much about someone knocking off your sister because it's serious business, right?
Condon: I'm not answering that question.
Sanborn: Okay.
Condon: I heard homicide on the radio.
Sanborn: Where did, where were you when you heard homicide on the radio?
Condon: Up, up by the picture taker, man. When I was first.. taken.
Sanborn: You got pretty good ears, Son.
Condon: Sure do. Picked up everything, right? I've been arrested a few times.
Sanborn: Okay.
Condon: I'm no dummy.
Sanborn: Okay. Does that...
Toderico: Yeah, but the thing is nobody said homicide.
Sanborn: Okay.
Condon: Look, that's what I heard, so I'm not talking any more about that. That's serious shit.
Sanborn: Yeah, it is serious.
Condon: Yeah. So I'm not talking about it. I don't know nothing about no homicide. Period.
Sanborn: You don't seem too upset about it, if it is true.
Condon: Well, I don't know if it is or it isn't. Who's pulling my leg, or what.
Toderico: Jes, I..

Sanborn: Okay, if we, if we want to discuss this homicide, you don't want to talk about it.

[Page 28 of 30]

Condon: No, I don't want to talk about any homicide, no. I'll get a lawyer before I do that.

Sanborn: Okay. All Right. We're not going to push you at all.

Condon: That's a Miranda right there.

Sanborn: That's right. That's why I read you your Miranda.

Condon: I've been pretty cooperative, but I ain't saying nothing, nothing about nothing I don't know nothing about.

Sanborn: Okay.

Condon:

Sanborn: Okay. I'll tell you what we're going to do at this point, Son, okay?

Condon: Yeah.

Sanborn: Ah, we're going to get some more information.

Condon: Sure.

Sanborn: Okay. We're not going to hound you. That is not our intent in talking to you.

Condon: Sure.

Sanborn: I thought that maybe you would want to talk with us, and give us more information, ah, you know. Some times people prefer to, to clean their conscience, and, ah, to admit it, and do it the easy way, and, and get it behind them. You have exercised your right to, to, ah, stop questioning. That you mentioned that if you were to answer any questions about a possible death of your

sister, then you want an attorney, so we're going to end it right there.

Condon: Okay.

Sanborne Okay? And we're going to take you back upstairs, and put you

[Page 29 of 30]

in the cellblock, and, ah, we're going to contact the proper authorities, and, if you change your mind, and wanna talk to us, or talk to me, then, ah, all you have to do is speak. We'll contact a lawyer for you eventfually here.

Condon: (burp) Excuse me.

Sanborn: Until that time, ah, we will not ask you any further questions.

Condon: Okay, fine.

Sanborn: Okay?

Condon: Yeah.

Sanborn: Let's take him back up.

Investigator's Signature	Date
Supervisor's Signature	Date
Detective Sergeant Sanborn	10-1-81

State v. Hammonds, 290 N.C.1, 224 S.E.2d 595, 603 (1976), later appeal, 34 N.C. App. 390, 238 S.E.2d 198 (1977) ("To allow a jury to speculate on the fate of an accused if found insane at the time of the crime only heightens the possibility that jurors will fall prey to their emotions and thereby return a verdict of guilty which will insure that defendant will be incarcerated for his own safety and the safety of the community at large."); State v. Taylor, 290 N.C. 220, 226 S.E.2d 23 (1976), later appeal, 294 N.C. 347, 240 S.E.2d 784 (1978); Commonwealth v. Mutina, 366 Mass. 810, 323 N.E.2d 294, 298-299, 301 (1975) (Generally, to inform jurors of the consequences of their verdicts could invite "result-oriented verdicts and possible deviation from the basic issues of a defendant's guilt or innocence. . . . If jurors can be entrusted with responsibility for a defendant's life and liberty in such cases as this, they are entitled to know what protection they and their fellow citizens will have if they conscientiously apply the law to the evidence and arrive at a verdict of not guilty by reason of insanity--a verdict which necessarily requires the chilling determination that the defendant is an insane killer not legally responsible for his acts."); Commonwealth v. Callahan, 380 Mass. 821, 406 N.E.2d 385 (1980), later appeal, 386 Mass. 784, 438 N.E.2d 45 (1982) (Judge may give instruction sua sponte); People v. Thompson, 197 Colo. 232, 591 P.2d 1031 (1979); State v. Babin, 319 So.2d 367

(Louisiana 1975), later appeal, 336 So.2d 780 (1976); Schade v. State, 512 P.2d 907, 918 (Alaska 1973) ("Studies on juroral behavior indicate that as a practical matter juries, in their deliberations, do tend to concern themselves with the consequences of the insanity verdict."); Kinsman v. State, 512 P.2d 901 (Alaska 1973); Morgan v. State, 512 P.2d 904 (Alaska 1973) (refusal to give instruction when requested constitutes reversible error); People v. Cole, 382 Mich. 695, 172 N.W.2d 354 (1969); People v. Staggs, 85 Mich.App. 304, 271 N.W.2d 211 (1978) (trial court must give instruction when requested by defendant or by jury); People v. Rone, 109 Mich.App. 702, 311 N.W.2d 385 (1981) (trial court may instruct jury sua sponte); Roberts v. State, 335 So.2d 285, 289 (Florida 1976) ("Freed from confusion and wonderment as to the possible practical effect of a verdict of not guilty by reason of insanity, jurors will be able to weigh the evidence relating to the factual existence of legal insanity in an atmosphere untroubled by the distracting thought that such a verdict would allow a dangerous psychopath to roam at large."); Isley v. State, 354 So.2d 457 (Fla. Dist. Ct. App. 1978); Bacon v. State, 346 So.2d 629 (Fla. Dist. Ct. App. 1977); Curtis v. State, 352 So.2d 540 (Fla. Dist. Ct. App. 1977), cert. denied, 361 So.2d 835 (Florida 1978); State v. Boyd, 222 Kan. 155, 563 P.2d 446 (1977); Kuk v. State, 80 Nev. 291, 392 P.2d 630 (1964) (Not error to give instruction: "We think the jury should know the consequences of such a verdict.");

Bean v. State, 81 Nev. 25, 398 P.2d 251 (1965), cert. denied, 384 U.S. 1012 (1966) (Refusal to give instruction not reversible error where jury was informed by defense counsel of consequences of verdict of not guilty by reason of insanity, in closing argument); State v. Shoffner, 31 Wis.2d 412, 143 N.W.2d 458 (1966); Commonwealth v. Mulgrew, 475 Pa. 271, 380 A.2d 349 (1977); State v. Daggett, 280 S.E.2d 545 (W.Va. 1981).

The instruction is required or permitted by statute in at least three states. See, e.g., State v. Hamilton, 216 Kan. 559, 534 P.2d 226 (1975) (instruction made mandatory); State v. Pike, 516 S.W. 2d 505 (Mo. App. 1974) (instruction mandatory upon defendant's request); People v. Bassik, 53 N.Y.2d 1032, 442 N.Y.S.2d 485 N.E.2d 873 (1981) (failure to give instruction not error where legislative rule permitting instruction not in effect at time of trial).

Contra: State v. Park, 159 Me. 328, 336, 193 A.2d 1,5 (1963) (". . . the function of the jury to to find the facts and to apply the law as given by the Court to the facts in reaching their verdict. Punishment, or whatever may transpire after the verdict, is not the concern of the jury."); State v. Dyer, 371 A.2d 1079 (Maine 1977); State v. Valenti, 265 S.C. 380, 218 S.E.2d 726 (1975); Spruill v. Commonwealth, 221 Va. 475, 271 S.E.2d 419, 426 (1980) (statutory procedures on acquittal by reason of insanity are directed to court, not jury; therefore, instruction "set[ting] forth detailed administrative procedures to be followed by court and Com-

missioner of Mental Health under the Code" not required to be given); Edwards v. Commonwealth, 554 S.W.2d 380, 384-85, (Kentucky 1977), cert. denied, 434 U.S. 999 (1977) (instruction which did not accurately state Kentucky law refused; court expresses approval of "majority rule" disapproving instruction on ground that it may "divert juries' attention from resolution of issue of defendant's criminal responsibility"); Aldridge v. State, 247 Ga. 142, 274 S.E.2d 525 (1981); State v. Lujan, 94 N.M. 232, 608 P.2d 1114 (1980); People v. Meeker, 86 Ill. App.3d 162, 41 Ill. Dec. 560, 407 N.E.2d 1058 (1980) (instruction not required to be given; under Illinois law, defendant found not guilty by reason of insanity is not necessarily committed for mental treatment).

In federal courts, by contrast, the instruction cannot be given, even if requested, because the federal statute requiring commitment proceedings upon a verdict of not guilty by reason of insanity has been construed to apply only in the District of Columbia. See, e.g., Government of Virgin Islands v. Fredericks, 578 F.2d 927 (3d Cir. 1978); United States v. Alvarez, 519 F.2d 1036 (3d Cir. 1975); United States v. Greene, 497 F.2d 1068, 1074-76 (7th Cir. 1975), cert. denied, 420 U.S. 909 (1975).

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No. 83-1402

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JOHN C. CONDON,
Petitioner

V.

STATE OF MAINE,
Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF THE
STATE OF MAINE

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

OPINION BELOW

The citation to the opinion of the Supreme Judicial Court of Maine in State of Maine v. John C. Condon is State v. Condon, 468 A.2d 1348 (Me. 1983).

STATEMENT OF THE CASE

On the night of September 27, 1981, Maureen and James Austin, the sister and brother-in-law of Petitioner Condon, and their twelve-year-old son, Douglas, were stabbed to death in their home on Seabourne Drive in Yarmouth, Maine. In addition, a fire was set in an upstairs bedroom and some jewelry and the family automobile were taken. In a jury trial in Maine Superior Court (Cumberland County), Petitioner was convicted of three counts of murder (17-A M.R.S.A. § 201(1)(A) and (B)), one count of arson (17-A M.R.S.A. § 802), and

two counts of theft by unauthorized taking (17-A M.R.S.A. §§ 353, 362). State v. Condon, 468 A.2d 1348, 1349 (Me. 1983).

1. The Police Interrogation.

Mr. Condon was neither suspected of nor being investigated with regard to any homicide at the outset of his interview with Detective Sergeant Sanborn on September 28, 1981. (T., Vol. V at 142, 146, 147, and 133). At the time that Detective Sanborn began his interview with Mr. Condon and gave him Miranda warnings, Mr. Condon had been arrested for driving without a license (T., Vol. V at 141) and Detective Sanborn was aware that a death had occurred in Yarmouth in the same house from which came the vehicle that Mr. Condon had been driving (T., Vol. V at 142-43); however, Detective Sanborn had no knowledge

that a triple homicide or any homicide had been committed in the Yarmouth house (T., Vol. V at 142, 146, 147, and 133). Concerned that Mr. Condon may have been involved in a burglary on account of his possession of a vehicle for which he could not prove ownership and his injured hands (T., Vol. V at 134, 147), Detective Sanborn "[s]tarted the interview with the intent to find out why he [Petitioner] was in possession of a vehicle" (T., Vol. V at 142). Hence, after giving the Miranda warnings, receiving Mr. Condon's affirmative response that he understood his rights and was willing to answer certain questions (T., Vol. V at 130, 137), and receiving Mr. Condon's affirmative nod that he would refuse to answer any questions that he chose to (T., Vol. V at 130-33,

137-41), Detective Sanborn's first question to Petitioner was: "I can only assume based on the information I have been given at this point, Son, that you were over in Yarmouth earlier and obtained a motor vehicle. Is that accurate thus far?" (T., Vol. V at 137; see Vol. V at 130). It was not until perhaps half way through the interview that Detective Sanborn was made aware by Lieutenant Toderico that the death at the Yarmouth house was in fact three homicides (T., Vol. V at 147-48).

Lieutenant Toderico's trial testimony that he suspected Mr. Condon of murder prior to the beginning of Detective Sanborn's interrogation (T., Vol. VI at 16-17) was not presented at the voir dire hearing into whether Mr. Condon's waiver of his Miranda rights was knowing,

intelligent, and voluntary. Detective Sanborn, who conducted the interrogation and gave the Miranda warnings to Mr. Condon, neither suspected nor was investigating Mr. Condon with regard to any homicide at the outset of the interview. (T., Vol. V at 142, 146, 147, and 133).

2. The Jury Voir Dire.

In the course of individual voir dire of the prospective jurors, nine of the twelve trial jurors who ultimately served in the instant case answered in response to Defense Counsel's own questions that they would be able to return a verdict of not guilty by reason of insanity without regard for the dispositional consequences of that verdict for Mr. Condon. (Constance Porter (T., Vol. II at 106-07); Mary Jenson (T., Vol. II at 226-27); Ruth Peterson (T., Vol.

II at 239-40); Denise Jacques (T., Vol. III at 86-87); Beverly Johnson (T., Vol. III at 93); James Villacci (T., Vol. III at 114); Mary Dougherty (T., Vol. III at 125-26); Barbara Hobbs (T., Vol. III at 131-32); and John Boyd (T., Vol. III at 137)). The two alternate jurors answered the same, again in response to Defense Counsel's own questions. (Estelle Bragdon (T., Vol. III at 186); Sandra Rich (T., Vol. III at 204-05)). Defense Counsel did not ask the three remaining trial jurors on individual voir dire whether they would be able to reach a not-guilty-by-reason-of-insanity verdict without regard for the dispositional consequences of that verdict for Mr. Condon; however, all three of these jurors answered in response to Defense Counsel's questions that they would return

a verdict of not guilty by reason of insanity if the evidence established that Mr. Condon was insane at the time of the killings. (Helen DeRice (T., Vol. I at 203-04); Eleanor Black (T., Vol. II at 74); Helen Cabral (T., Vol. II at 81)).

3. Trial Evidence Rebutting Mr. Condon's Insanity Defense.

(A) Dr. Ulrich Jacobsohn, called by the Defense as an expert witness concerning Mr. Condon's mental condition, testified that in September 1981 - around the time that the Defendant killed the Austins - the Defendant was in the "beginning of a manic phase, but we do not have evidence to support a finding that he had, indeed, lost contact with reality." (T., Vol. VIII at 162-63). Dr. Jacobsohn also agreed that Mr. Condon's mental condition had not

approached a psychotic level at the time of the killings. (T., Vol. VIII at 162). Later, as a rebuttal witness for the State, Dr. Jacobsohn testified that it was his opinion that on September 27-28, 1981 - the time at which Mr. Condon committed the homicides - Mr. Condon "was neither suffering from mania nor depression on that day." (T., Vol. IX at 187-88). Dr. Jacobsohn based his opinion on

> the description of his [the Defendant's] conduct before [the slayings] and the tape [of Officer Sanborn's interview with the Defendant] as well as my own examination [on September 29, 1981] within 30 hours of the event. Those are fairly close to the time and to me make it within the range of medical certainty that no mania or depressive state existed.

(T., Vol. IX at 188). Dr. Jacobsohn also

testified that when he examined Mr. Condon on September 29, 1981, he saw no evidence of (1) psychomotor retardation or acceleration (T., Vol. IX at 180-81), (2) delusions (T., Vol. IX at 181, 188), (3) amnesia (T., Vol. IX at 181), (4) hallucinations (T., Vol. IX at 181, 188), and (5) an unusual affect in mood, "it was neither depressed nor elated" (T., Vol. IX at 182). Dr. Jacobsohn additionally testified that, after reading the transcript of Mr. Condon's tape-recorded interview with Detective Sanborn, he concluded that

> the answers were quite responsive and they were appropriate. But I didn't know what the rate of speech was and what the inflection of the voice was, so I asked to hear the tape [State's Exhibit #60 - the same tape the jury had already listened_

> to (T., Vol. V at 157-58)] specifically for the purpose of listening to the tempo or the rate of words, the speed of the productions, to make a determination whether he was or was not at that time in a manic episode. And to the best of my abilities I just could not detect any acceleration of thought based on that tape.

(T., Vol. IX at 189).

(B) Defense Exhibit #2C - a hospital record of Mr. Condon's admission to the Augusta Mental Health Institute on January 21, 1982 (T., Vol. VII at 33-34, 72-73) - reported that Mr. Condon had made comments at the Cumberland County Jail that his bizarre behavior was simply an attempt to make everyone think he was crazy at the time he committed the Austin homicides. (T., Vol. VII at 73; T., Vol. VIII at 32).

(C) Alwyn Martin testified that Mr. Condon acted like a "perfect gentleman" on the weekend of September 26-27, 1981, when purchasing from Martin the K-Bar knife that Mr. Condon used to kill the Austins. (T., Vol. IV at 115-16).

(D) Billie Ann Larkin testified that Mr. Condon was very "polite" on the evening of September 27, 1981, when she served him coca-cola at Bubba's Restaurant. (T., Vol. IV at 132, 144). On cross-examination, Larkin also testified that although Mr. Condon was "ill at ease and impatient" to use the telephone in the restaurant he was not "jumpy," "belligerent," "hyper," or "strange." (T., Vol. IV at 134, 138-39, 142-43).

(E) James Bilodeau, a detective with the Scarborough Police Department, testified that Mr. Condon was oriented as to time, place, and person, responded appropriately to questions, and was not hyperactive when he questioned Mr. Condon at approximately 6:15 a.m. on September 26, 1981, with regard to the burglary at the Hay and Peabody Funeral Home. (T., Vol. VII at 102-03).

(F) Scarborough Police Officer David Twombly testified that Mr. Condon was oriented as to time, place, and person - i.e., knew where he was, where he was going, who he was, and who Officer Twombly was - when Officer Twombly stopped Mr. Condon on his motorcycle for speeding on September 25, 1981. (T., Vol. VII at 93).

(G) Dr. Thomas DeFanti testified that Mr. Condon was oriented as to time, place, and person - i.e., knew that he was at the Maine Medical Center, knew that he was John Condon, and responded appropriately to questions - when Dr. DeFanti treated him on September 26, 1981, between approximately 3:00 a.m. - 4:00 a.m. at the Maine Medical Center. (T., Vol. IX at 169-70).

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE MAINE SUPREME JUDICIAL COURT'S DECISION THAT A TRIAL JURY SHOULD NOT BE INSTRUCTED ON THE DISPOSITIONAL CONSEQUENCES OF A VERDICT OF NOT GUILTY BY REASON OF INSANITY WAS A FAIR RESULT ON THE FACTS OF THIS PARTICULAR CASE.

This Court should deny Mr. Condon's petition for a writ of certiorari, at least

on the issue of whether a trial jury should be instructed on the dispositional consequences of a verdict of not guilty by reason of insanity, because the Maine Supreme Judicial Court's decision that a jury should not be so instructed was a fair result on the facts of this case. Nine of the twelve trial jurors in this case answered in response to Defense Counsel's own questions during individual voir dire that they would be able to return a verdict of not guilty by reason of insanity without regard for the dispositional consequences of that verdict for the Defendant. (Constance Porter (T., Vol. II at 106-07); Mary Jenson (T., Vol. II at 226-27); Ruth Peterson (T., Vol. II at 239-40); Denise Jacques (T., Vol. III at 86-87); Beverly Johnson (T., Vol. III at 93); James

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established that the Defendant was insane at the time of the killings. (Helen DeRice (T., Vol. I at 203-04); Eleanor Black (T., Vol. II at 74); Helen Cabral (T., Vol. II at 81)). Neither on his appeal to the Maine Supreme Judicial Court nor in the instant petition does Petitioner set forth any evidence to show that the trial jurors were dishonest in their voir dire answers or that they did other than what they said they would do in reaching their verdict.

Petitioner contends that the trial jurors in his case should have been instructed on the dispositional consequences of an insanity verdict to avoid the possibility that the jurors, on the mistaken assumption that an insanity acquittee would be set free into the community, would skip over the evidence of

insanity and return a guilty verdict in order to insure Petitioner's confinement and removal from society. However, given that nine trial jurors answered on individual voir dire that they would be able to return an insanity verdict without regard for dispositional consequences and that the remaining three jurors stated that they would return a not-guilty-by-reason-of insanity verdict if warranted by the evidence, Petitioner's requested instruction on dispositional consequences was unnecessary in this case because all twelve jurors stated in one way or another that they would give due consideration to the evidence of insanity and decide the issue on a proper basis.

Moreover, the jury's verdict of guilty and the rejection of Mr. Condon's insanity

defense were well-supported by the evidence, further indicating that Mr. Condon was not deprived of a fair trial by the refusal to instruct the jury on the dispositional consequences of an insanity verdict. Dr. Ulrich Jacobsohn, called by the Defense as an expert witness concerning the Defendant's mental condition, testified that in September 1981 - around the time that the Defendant killed the Austins - the Defendant was in the "beginning of a manic phase, but we do not have evidence to support a finding that he had, indeed, lost contact with reality." (T., Vol. VIII at 162-63). Dr. Jacobsohn also agreed that the Defendant's mental condition had not approached a psychotic level at the time of the killings. (T., Vol. VIII at 162). Later, as a rebuttal witness for the State,

Dr. Jacobsohn testified that it was his opinion that on September 27-28, 1981 - the time at which the Defendant committed the homicides - the Defendant "was neither suffering from mania nor depression on that day." (T., Vol. IX at 187-88). Dr. Jacobsohn based his opinion on

> the description of his [the Defendant's] conduct before [the slayings] and the tape [of Officer Sanborn's September 28th interview with the Defendant] as well as my own examination [on September 29, 1981] within 30 hours of the event. Those are fairly close to the time and to me make it within the range of medical certainty that no mania or depressive state existed.

(T., Vol. IX at 188). Dr. Jacobsohn also testified that when he examined the Defendant on September 29, 1981, he saw no

evidence of (1) psychomotor retardation or acceleration (T., Vol. IX at 180-81), (2) delusions (T., Vol. IX at 181, 188), (3) amnesia (T., Vol. IX at 181), (4) hallucinations (T., Vol. IX at 181, 188), and (5) an unusual affect in mood, "it was neither depressed nor elated" (T., Vol. IX at 182). In addition, the testimony of other witnesses who observed Mr. Condon's conduct in the days immediately prior to the homicides without noticing any signs or symptoms of manic-depression contradicted the exculpatory expert testimony that Mr. Condon was suffering from mental illness at the time of the killings. See State v. Condon, 468 A.2d 1348, 1351 (Me. 1983).

For the above reasons, the Maine Supreme Judicial Court's decision that a trial jury should not be instructed on the

dispositional consequences of a verdict of not guilty by reason of insanity was a fair result on the facts of this particular case. This Court should therefore exercise its discretion against granting Mr. Condon's petition on this issue.

II. THE MAINE SUPREME JUDICIAL COURT GAVE FULL CONSIDERATION TO THE ISSUE OF WHETHER MR. CONDON KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED HIS MIRANDA RIGHTS IN THE ABSENCE OF BEING INFORMED THAT HE WAS A CRIMINAL HOMICIDE SUSPECT AND DECIDED THE ISSUE CORRECTLY.

The Maine Supreme Judicial Court followed the rule embraced by the Third, Fourth, and Fifth Circuits that a suspect's ignorance of the exact crime for which he is being interrogated is but one factor to consider in the determination of whether

there has been, in the totality of the circumstances, an effective waiver of Miranda rights. State v. Condon, 468 A.2d 1348, 1350 (Me. 1983) (citing Carter v. Garrison, 656 F.2d 68, 70 (4th Cir. 1981), cert. denied, 455 U.S. 952 (1982); United States v. McCrary, 643 F.2d 323, 329-30 & n.11 (5th Cir. 1981); Collins v. Brierly, 492 F.2d 735, 738-39 (3rd Cir.), cert. denied, 419 U.S. 877 (1974). Under the totality of the circumstances, the Maine Court correctly decided that Mr. Condon did knowingly, intelligently, and voluntarily waive his Miranda rights, even though Mr. Condon was not informed prior to the waiver that he was a criminal homicide suspect.

Petitioner takes the opposite position, i.e., that under the totality of the circumstances Petitioner's waiver could not

have been knowing, intelligent, and voluntary because he was not informed prior to the waiver that he was a suspect in a criminal homicide. This position rests on several factual points, particularly (1) that Mr. Condon did not verbally and clearly waive his Miranda rights at the outset of the interrogation and (2) that Mr. Condon was suspected of criminal homicide from the outset of the interrogation. (Petition at 57-60). As for the first point, however, "an explicit statement of waiver is not invariably necessary to support a finding that the defendant waived the right to remain silent or the right to counsel guaranteed by the Miranda case." North Carolina v. Butler, 441 U.S. 369, 375-76 & n.6 (1979). Moreover, pursuant to Butler the Maine

Supreme Judicial Court found that "[t]he record provides rational support for the presiding justice's determination that the defendant knowingly, intelligently, and voluntarily waived his rights after receiving his Miranda warnings." State v. Condon, 468 A.2d at 1350. Hence, a review of this issue by this Court would involve primarily delving into the Maine courts' findings of facts made pursuant to familiar legal rules, which is not an appropriate matter for review by this Court.

The inappropriateness of Petitioner's issue for review by this Court on this ground is further illustrated by the second factual point underlying Petitioner's position, i.e., that Mr. Condon was suspected of criminal homicide from the outset of the interrogation. On the

contrary, the testimony at the voir dire hearing concerning the adequacy of Mr. Condon's waiver was unequivocal and uncontradicted that Mr. Condon was neither suspected of nor being investigated with regard to any homicide at the outset of his interview with Detective Sergeant Sanborn. (T., Vol. V at 142, 146, 147, and 133). At the time that Detective Sanborn began his interview with Mr. Condon and gave him Miranda warnings, Mr. Condon had been arrested for driving without a license (T., Vol. V at 141) and Detective Sanborn was aware that a death had occurred in Yarmouth in the same house from which came the vehicle that Mr. Condon had been driving (T., Vol. V at 142-43); however, Detective Sanborn had no knowledge that a triple homicide or any homicide had been committed

in the Yarmouth house (T., Vol. V at 142, 146, 147, and 133). Concerned that Mr. Condon may have been involved in a burglary on account of his possession of a vehicle for which he could not prove ownership and his injured hands (T., Vol. V at 134, 147), Detective Sanborn "[s]tarted the interview with the intent to find out why he [Petitioner] was in possession of a vehicle" (T., Vol. V at 142). Hence, after giving the Miranda warnings, Detective Sanborn's first question to Petitioner was: "I can only assume based on the information I have been given at this point, Son, that you were over in Yarmouth earlier and obtained a motor vehicle. Is that accurate thus far?" (T., Vol. V at 137; see Vol. V at 130). It was not until perhaps half way through the interview that Detective

Sanborn was made aware by Lieutenant Toderico that the death at the Yarmouth house was in fact three homicides (T., Vol. V at 147-48). Petitioner's assertion that the State's "interrogation of petitioner did in fact involve from the very beginning a ... 'homicide' (Toderico)" (Petition at 59) is an inference drawn from Lieutenant Toderico's trial testimony (T., Vol. VI at 16-17); however, this evidence was never presented at the voir dire hearing into whether Mr. Condon's waiver of his Miranda rights was knowing, intelligent, and voluntary. Moreover, it was Detective Sanborn who conducted the interrogation, and he neither suspected nor was investigating Mr. Condon with regard to any homicide at the outset of the interview. (T., Vol. V at 142, 146, 147, and 133).

Hence, the State's position is that even if arguendo the police do have a duty as part of the Miranda warnings to inform a suspect of the crime which is being investigated, Detective Sanborn could not have informed Mr. Condon at the time of the Miranda warnings that Condon was suspected of murder because at that time Condon was not. The State's position therefore underscores the State's earlier point that a review by this Court of the issue presented by Petitioner would involve delving into issues of fact concerning the totality of the circumstances in which the waiver was given, which issues are not appropriate matter for review by this Court, rather than confronting simply the straight issue of law as to whether police have a duty as part of the Miranda warnings to inform a suspect of the crime which is being investigated.

Finally, under the totality of the circumstances, the Maine Supreme Judicial Court correctly decided that Mr. Condon did knowingly, intelligently, and voluntarily waive his Miranda rights. First, after being given Miranda warnings, Mr. Condon stated that he was willing to answer police questions "[t]o a certain extent" without an attorney; and second, Petitioner nodded his head affirmatively that he understood he could refuse to answer any questions. (T., Vol. V at 137-41, 130-33). Third, "[t]he record contains no evidence of force or intimidation." State v. Condon, 468 A.2d at 1350. Fourth, the possible burglary and car theft, about which Petitioner was interrogated at the outset of the interview, and a possible homicide did not involve unrelated criminal conduct

and crimes. All of the criminal activity occurred at the same time and place. In answering questions concerning the possible burglary and car theft, Petitioner knew that he was discussing a possible criminal incident that had recently occurred at the Austin residence where, as it developed later, the Austin homicides had also occurred. State v. Condon, 468 A.2d at 1350. Fifth, Mr. Condon demonstrated both his understanding of and his ability to exercise his rights to remain silent and to have counsel present before or during interrogation because later in the interview, when Detective Sanborn's questioning began to focus on the slaying of Mr. Condon's sister, Petitioner stated, "I'm not going to open my mouth too much about that" (T., Vol. V at 119-20), and

then subsequently stated, "No, I don't want to talk about any homicide, no. I'll get a lawyer before I do that. ... That's a Miranda right there" (see the Transcript of State's Exhibit #60 (the cassette tape of Detective Sanborn's interview with Mr. Condon) at 29). Given this evidence, the Maine courts did not err in finding that Petitioner knowingly, intelligently, and voluntarily waived his Miranda safeguards up to the point where he stated, "I'm not going to open my mouth too much about that." If Mr. Condon had wanted to retract his waiver at any time prior to this point, e.g., in response to Sanborn's question "Have you ever taken anyone's life, Son?" (T., Vol. V at 119), Petitioner's exercise of his Miranda rights soon afterwards demonstrates that he understood he could

have exercised them at that earlier point. The fact that he did not and instead answered, "No. Never. No. Why? Did someone knock off my sister or something?" (T., Vol. V at 119) - thereby initiating the specific subject of his sister's death (T., Vol. V at 159) - indicates that Petitioner had decided to answer that question and was not yet ready to retract his waiver.

For all of these reasons, the Maine Supreme Judicial Court correctly decided that, under the totality of the circumstances, Mr. Condon did knowingly, intelligently, and voluntarily waive his Miranda rights. For this reason, and also because a review by this Court of the issue presented by Petitioner would involve delving into questions of fact rather than confronting simply a straight issue of law,

this Court should exercise its discretion against granting Mr. Condon's petition on this issue.

III. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE IT WAS FILED OUT OF TIME UNDER U.S. SUP. CT. RULE 20.1.

Mr. Condon's petition for a writ of certiorari should be denied because it was not filed within sixty days after the entry of the Maine Supreme Judicial Court's judgment in State of Maine v. John C. Condon, 468 A.2d 1348 (Me. 1983). U.S. Sup. Ct. Rule 20.1. The Maine Court's judgment was entered on December 5, 1983. Mr. Condon's petition for a writ of certiorari was not filed with the Clerk of the United States Supreme Court, however, until February 21, 1984, seventy-eight (78)

days after the entry of the Maine Court's judgment. The petition should therefore be denied.

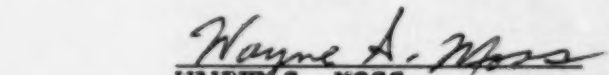
Petitioner presumably tries to bring the filing of his petition within U.S. Sup. Ct. Rule 20.1's sixty-day filing period on the ground that the sixty days began to run on December 21, 1983, the day his petition for rehearing was denied by the Maine Supreme Judicial Court, not December 5, 1983, the day of entry of the Maine Court's judgment. (Petition at 2). Even if Petitioner is correct that the sixty days began to run on December 21, 1983, his petition was still filed out of time because February 21, 1984 - the petition's filing date - was sixty-two (62) days after December 21, 1983.

Moreover, since Maine has no statute, no court rule, and in fact no authority for rehearing or reconsideration by the Maine Supreme Judicial Court of a judgment entered in a direct appeal, U.S. Sup. Ct. Rule 20.1's sixty-day filing period should be computed from the date that the Maine Court's judgment was entered (December 5, 1983), not from the date that Petitioner's petition for rehearing was denied (December 21, 1983). In either case, Mr. Condon's petition for a writ of certiorari was filed outside of Rule 20.1's sixty-day filing period and should therefore be denied.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Dated: 4/24/84 Respectfully submitted,



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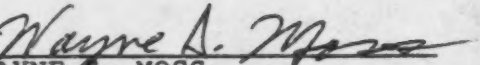
CERTIFICATE OF SERVICE PURSUANT TO U.S. SUP. CT. RULES 28.5(b) AND 35.7

I, Wayne S. Moss, Counsel of Record for Respondent State of Maine and a member of the Bar of the Supreme Court of the United States, hereby certify that pursuant to U.S. Sup. Ct. Rule 28.3 I have caused three (3) copies of the State of Maine's "Brief in Opposition" to be served upon the only other party to this proceeding, i.e., Petitioner John C. Condon, by depositing said copies in a United States Post Office, with first-class postage prepaid, addressed to Petitioner's Counsel of Record as follows:

Oliver C. Biddle, Esquire
30 South 17th Street
Philadelphia, Pennsylvania 19103

Dated at Augusta, Maine, this 24th day of April, 1984.



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